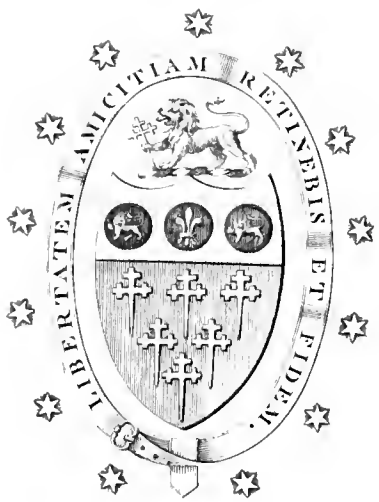

• John • Adams.

For I do not think the book which the Lord Chancellor Fortescue wrote in the reign of King Henry the 6th can be properly called a System of law — It was published by him for three purposes; first, to obviate the design of two great favorites, the Dukes of Exeter & Suffolk, who had used some endeavors to introduce the imperial laws, and therefore he shews the excellency of the Common laws above that; and in the next place, it was intended to soften the warlike character of the young prince Edward, by inclining him to the study of those laws by which he was to govern his people, and to instruct him in some measure therein.

Preface to 3 Modern Leach's Edit: Lond 1791.

John Adams 1770

REPORTS

OF

SELECT CASES

In all the COURTS of

WESTMINSTER-HALL;

ALSO THE

OPINION

OF

All the JUDGES of *England* relating to the Grandeſt Prerogative of the ROYAL FAMILY, and ſome *Obſervations* relating to the Prerogative of a QUEEN CONSORT.

By the Right Honourable

JOHN Lord *FORTESCUE,*

Late one of the *Juſtices* of the COMMON PLEAS.

With TABLES of the Names of the Caſes and Principal Matters.

In the SAVOY:

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THE

PREFACE.

THE grand Diviſion of Law, is into the Divine Law, and the Law of Nature; ſo that the Study of Law in general, is the Buſineſs of Men and Angels. Angels may deſire to look into both the one, and the other; but they will never be able to fathom the Depths of either. Nothing but infinite Wiſdom itſelf can comprehend that Law, by which the infinitely wiſe Architect at firſt created, and now directs and governs the whole Univerſe. By this Law every Thing lives, and moves, and has its Being. By this Law every Thing is beautifully produced, in Number, Weight and Meaſure. 'Tis by this Law, that the vaſt Bodies, which compoſe our ſolar Syſtem, by conſtant and uniform Revolutions, keep in perpetual Motion; being endued with the ſurprizing Power of Attraction, implanted by the Almighty Hand, and conſtantly ſupplied by an Almighty Care, as is clearly demonſtrated by that greateſt of Mathematicians, Sir *Iſaac Newton.* And as the infinitely wiſe Author of all Things, has ſet a Rule or Law to the Motions of irrational Beings; ſo he has made a Law to regulate the Actions, and govern the Affections of Mankind; and has ſet up a Light in every Man's Breaſt, ſufficient to demonſtrate to him the Being of his glorious Creator and Benefactor, and to enable him to chooſe the true Religion from the falſe; and thereby to guide him thro' a Vale of Miſeries to Eternal Reſt.

Law divided into the Divine Law, and Law of Nature.

Now as there is no Motion given by the Hand of infinite Power to any Body, but what anſwers the End of that Being, and is uſeful to it; ſo there is no Law given to Man by our great Creator, tho' of never ſo reſtrictive a Quality, but what is intirely beneficial to him, and tends to the Preſervation of his Being, or Continuation of his Happineſs; ſo that the true Nature of every Law is, that

The Divine Law beneficial to Man.

it tends to the Support and Preſervation of that Being, which is to be directed and govern'd by it. How good a Maſter then does Man ſerve, and how happy is Man under ſuch a Law, as is ſet over his Actions, for no other purpoſe but to ſecure his Happineſs. From hence the great Princes of the Earth may learn to govern after the great Example of the *King of Kings.* And from hence, as a true Corollary and Conſequence, it follows, that Laws inſtituted upon the Foundations of *Arbitrary Power*, to oppreſs and deſtroy the Subject, are againſt Nature and eternal Juſtice, ſubverting the very End and Purpoſe for which all Laws were made.

Corollary thereupon.

Now of all the Laws, by which the Kingdoms of the Earth are governed, no Law comes ſo near this Law of Nature and the Divine Pattern, as the Law of *England*; a Syſtem of Laws, ſo Comprehenſive, ſo Wiſe, ſo favourable to the Subject, and yet ſo ſtrongly guarding the Prerogatives of the Prince, that no Nation upon Earth does enjoy the like. The Law of *England* is really to us who live under it, the Foundation of all our Happineſs; it ſecures to us our Eſtates, our Liberties, and our Lives, and all that is dear to us in this Life; and not only ſo, but by ſecuring our Religion, it ſecures to us the Means of attaining everlaſting Happineſs too.

Praiſe of the Law of *England* as neareſt to the Law of Nature;

it ſecures our Eſtates, Liberties, Lives and Religion.

Whoever will look into our Books of Law, will find in the firſt Place, that Care is taken in giving proper and clear Meanings, or Definitions of the Terms of our Law; from thence our Law proceeds to Axioms and poſitive Laws, ſettled either by known Cuſtoms, or expreſs Statutes; which are always ſteadily kept to. Then ſee what Care is taken for a Diſcovery of the Truth in Matters of Fact; and for that Purpoſe, a Jury of Twelve upright and ſubſtantial Men is, by the Law, to be ſummon'd from thoſe Parts where the Fact is ſuppoſed to be done, who judge and determine thereupon according to the Evidence given them, and bring in their Verdict purſuant to the Direction of a Learned Judge in Point of Law. And that they may have the moſt exact and certain Teſtimony, the Law admits of no written Depoſitions; but the Witneſſes are to come

It is clear and determinate.

The Benefit of Trials by Juries,

in

in Perſon, and to be examined *vivâ voce*, both by Judge and Counſel; which Method of inveſtigating Truth, in the Nature of it, is greatly preferable to that of other Nations, or in Equity in this Nation, where the written Depoſitions of the Witneſſes are allowed for Proof. For it is not poſſible to foreſee at once, what Interrogatories will be proper, unleſs a Man could prophecy, what Anſwer the Witneſs would give; and therefore it is often in Experience (as I have myſelf) found that after a Matter of Fact, on the written Teſtimony of the Witneſſes, has appeared to be one Way, on Examination of the ſame Witneſſes *vivâ voce*, on a Trial at Law granted in the ſame Cauſe, the Truth has come out to be clearly the quite contrary. The Mein and Behaviour of a Witneſs, his Countenance, and the Paſſions of his Mind, oftentimes diſcover thoſe Truths which are never to be found out from a dead Depoſition. This Rule therefore of determining Cauſes by a Jury is called, by one of the greateſt Men of the Age he lived in, and alſo Chancellor, *viz.* Lord *Bacon*, The *Lanthorn* of *Juſtice*.

and Witneſſes *vivâ voce*.

In other Nations, every Lawyer's Opinion goes for Law, but it is not ſo with us; nor is our Law rack'd and tortur'd with ſuch Voluminous Comments and Gloſſes, which make Diſputes endleſs, and eat out the very Heart of the Law. Our Judges do not determine (and that is our Happineſs) as other Nations do, (where the Judges are abſolute) who judge and determine according to their Princes, or their own, arbitrary Will and Pleaſure; but ours determine and judge according to the ſettled and eſtabliſhed Rules, and antient Cuſtoms of the Nation, approv'd for many Succeſſions of Ages.

Our Judges proceed by known Rules.

To have no Rule in deciding Controverſies, but only the Rule of mere Equity, is to begin the World again; to make Choice of that Rule, which out of mere Neceſſity was made uſe of, in the Infancy of the State, and Indigency of Laws, and now is the only Rule among the *Indians* and *Hottentots* in *Africa*. And to ſet up this Rule, after Laws are eſtabliſh'd, and leave the Matter at large, is it not rather unravelling, by unperceiv'd degrees, the fine and cloſe Texture of the Law of *England*, which has been ſo many hundred

Inconvenience of judging merely by Rules of Equity.

Years

Years making? And which made a noble Lord and a great and learned Chancellor ſay once, if Equity were too much encouraged, it would in Time eat out the Heart of the Common Law of *England.*

The Antiquity of the Laws of *England* is an Honour to the Nation.

Now as to the Antiquity of the *Engliſh* Laws, I am apt to think it is not very difficult to make out, that they are as ancient, as the Laws of moſt Countries in the World. The Antiquity of our Laws is an Honour to the *Engliſh* Nation not to be diſregarded: For, the Laws themſelves gain great Strength and Authority by their Antiquity. The longer any Laws continue in Uſe and Practice, the ſtronger and more forcible is the Argument for their Goodneſs and Excellence. And ſhould we allow our Laws to have an uncertain Original, I fear that ſome People would of themſelves fix their Original from *William* the Conqueror; and if that ſhould be taken for granted, I don't know what ill uſe the Champions of abſolute Monarchy may be inclined to make of ſuch a Conceſſion; *viz.* that our Laws began in a Conqueror's Time, and conſequently were given by a Conqueror. Now Chancellor *Forteſcue*, my Anceſtor who lived many Years ago, and ſo might have a better View of Antiquity, ſays, in his Book *De Laudibus Legum Angliæ*, that neither the *Roman*, nor *Venetian* Laws, which are eſteemed very ancient, can claim a greater Antiquity than ours, which, ſays he, in Subſtance are ſtill the ſame, as they were originally. 'Tis a trivial Queſtion, ſays *Selden*, made by thoſe who would ſay ſomething againſt the Laws of *England*, if they could; When and how began your common Laws? But the Anſwer is ready, In the ſame Manner, as the Laws of all other Kingdoms, *i. e.* when there was firſt a civilized State in the Land. Every Nation, unleſs it borrows Laws from other Countries, muſt firſt begin with the Laws of Nature, and thereupon are introduced poſitive Inſtitutions, and municipal Laws for the Policy of the Government; afterwards, in Proceſs of Time, Cuſtoms are created; and then are laid judicial Determinations and Reſolutions on thoſe firſt Foundations; and ſo a Body of Laws is compoſed.

The Teſtimony of Lord Chancellor *Forteſcue* and Mr. *Selden.*

Origine of National Laws.

Now

Application thereof to the Laws of *England.*

Now as to that Part of the Law of *England*, which ſubſiſts, and is founded on the Law of Nature, and which is no ſmall Part thereof, every one muſt agree, ſuch of our Laws are as ancient as any; becauſe Nature is the ſame in all Laws, and in regard to this, all Laws founded upon Nature are equally ancient. And as to the other Part of our Laws, conſiſting of poſitive Inſtitutions for the Well-government of the People, and the Cuſtoms and Uſages amongſt us, it cannot be doubted, but that we may have ſome, tho' perhaps not many, that participate even of the *Roman* and *Britiſh* Policy; and 'tis plain by the Account we have of the *Britains*, and of their barbarous Cuſtoms and Manners, that even after the *Romans* were here, we were ſo far from being poliſh'd by them, that the *Romans* had made no ſenſible Alteration among them, neither in their Laws, Language, nor Policy. But when we come to the Time of the *Saxons*, we find a very great Alteration, a new Language introduced, and Volumes of Laws both Eccleſiaſtical and Civil were publiſhed.

Some part, borrowed from the *Romans* and *Britons* and *Saxons.*

The firſt *Saxon* Laws, after *Auſtin* the Monk was ſent hither by *Gregory* the Great for the Converſion of this Nation, were made by *Æthelbert* the firſt Chriſtian King, who began his Reign in 561, not above four Years after the Death of *Juſtinian* the Emperor, and died in 616.

The firſt *Saxons* Laws

Venerable *Bede* ſays, theſe *Saxons* Laws were made according to the Example of the *Romans*, Mid dnotera ȝeþeaxe, *Mid dnotera getheate*, with the Thought or Advice of his Wiſemen or *Parliament*; and the King commanded them to be wrote and publiſhed in *Engliſh.* And tho', ſays he, the Laws of the *Saxons* have undergone ſome Variations thro' Time and Age, which change every Thing; yet they continue in the main to this Day. For it ſeems every *Saxon* King did, one after another, confirm moſt part of the Laws of his Predeceſſor; tho' by the Advice of his Parliament he made ſome new ones, as is now done in every Reign.

by Advice of Parliament.

King *Alfred* collected the *Saxon* Laws,

King *Alfred* indeed, who began his Reign in 871, is called *Magnus Juris Anglicani Conditor*, The great Founder of the *Engliſh* Laws; but what is meant by that Expreſſion, is not that thoſe Laws were firſt made in his Time; for, there were *Saxon* Laws then in Being, which had been made for above Three hundred Years before his Reign; but the Meaning was this only, that he, being the firſt ſole Monarch after the Heptarchy, collected the Subſtance of the Laws of all the former *Saxon* Kings, from King *Æthelbert* to his Time, who were Kings only of Parts of the Land, into one Body, and ſo formed one intire Codex, or Book of Laws.

with Advice of Parliament.

This appears plainly from the Preface of King *Alfred*'s Laws, which ſays, That King *Alfred* made a Collection of all the Laws then in Being, thoſe which he liked he choſe, and thoſe which he liked not he rejected; and this was done Mid pitena ȝeþeaƫ, *Mid witena getheat*, with the Thought, *i. e.* Advice of his Wiſemen or Parliament, for he durſt not, as 'tis ſaid, mix any of his own, for fear Poſterity ſhould not like them; and therefore he collected out of the Laws of *King Ina*, *King Offa*, and *Æthelbert*, who were his Predeceſſors, ſuch as were the beſt, and the reſt he rejected; and this Collection, ſo made with the Advice of his Parliament, he thought fit to confirm and eſtabliſh; and enacted to be obſerved throughout the Kingdom.

Why called the Common Law of *England?*

Now this Codex being made up of ſuch a Variety of different Laws, enacted by the ſeveral *Saxon* Kings reigning over diſtinct Parts of the Kingdom; and theſe ſeveral Laws, which then affected only Parts of the *Engliſh* Nation, being now reduced into one Body, and made to extend equally to the whole Nation; it was very proper to call it, The *Common Law of England*; becauſe, thoſe Laws were now firſt of all made Common to the whole *Engliſh* Nation. And therefore it is ſaid, in the Life of this great King, that, this was done, *Ut in jus commune totius gentis tranſiret.* Now this is very natural if it be farther conſidered, that he made this Collection of Laws juſt upon his Subduing the other

Saxon and *Daniſh* Kings, whereby he became the ſole Monarch of *England.*

Now I find this *Jus Commune*, *Jus Publicum*, was ſoon after call'd in *Saxon* the Folcpihz or *Folcright*, *i. e.* the People's Right; which in all the ſubſequent Laws of the *Saxons* is mentioned and confirmed by all the ſucceeding *Saxon* Kings. And it is not very unlikely, but that this Collection of Laws, thus made by King *Alfred*, and ſet down in one Codex, might be the ſame with the Dom-bec or *Doombook*, called *Liber Judicialis*, which is referr'd to in all the ſubſequent Laws of the *Saxon* Kings; and was the Book of Laws or Statute Book that they determined Cauſes by; for before this King's Reign, that is, King *Alfred*'s, I no where find any Mention made either of *Folcright* or *Domebook*. But in the next Reign, you find King *Edward* the Elder commanding all his Judges to give pihz Domaz, *right Domas*, right or juſt Judgments (*Dome* in *Saxon* ſignifying a Judgment,) to all the People of *England*, to the beſt of their Skill and Underſtanding, as it ſtands in the *Dome-book* or Book of Laws; and farther commands, that nothing make them afraid to declare and adminiſter the *Folcright*, that is, the Common Law of *England*, to all his loving Subjects.

How called by the *Saxons*.

Doom-book,

From this Original it is, that our Common Law came, and it is very probable this *Domebook* (not Doomſday Book) was compiled by King *Alfred*; and therein was contained that Collection of Laws which ſome have called, a Book of Judgments or Reſolutions, given by the *Saxon* Judges, or in modern Phraſe, The Reports of thoſe Times.

probably compiled by King *Alfred*, in the Nature of Reports of Judgments.

From hence alſo I would obſerve, that it is from this ancient Origin, that our Common Law Judges fetch that excellent Uſage of determining Cauſes according to the ſettled and eſtabliſhed Rules of Law, and that they have acted up to this Rule for above Eight hundred Years together, and, to their great Honour, continue ſo to do to this very Day.

Hence the modern Uſage is deduced.

Now

Opinion that King *Edward* the Confeſſor compiled the Common Law,

Now it is affirmed by ſome, that King *Edward* the Confeſſor, perceiving this Kingdom to be governed by a threefold Law, that is, the *Dane-laga*, *Saxon-laga*, and *Mercen-laga*, and that Mulcts and Fines were to be ſet differently upon his Subjects, according to thoſe Laws, reduced them all to one, and from thence thought it was certainly called the Common Law of *England*. But this is a great Miſtake, tho' ſeveral, one after another, have repeated the ſame Thing; for, not to inſiſt that this Account betrays its want of Accuracy, in not taking Notice of another Species of Law, to be found among the *Saxon* Laws, called *Englalaga*, it is pretty plain, that thoſe Laws could not be at that Time conſolidated, and thrown into one Body of Laws, becauſe each of thoſe Species of Laws was in force after, and are to be found not only in *Edward* the Confeſſor's, but in all the Laws of *William* the firſt. And not only Mulcts and Fines ſet according to the *Dane-laga*, *Saxon-laga* and *Mercen-laga*, but Cuſtoms and Uſages ſet out to be obſerved according to thoſe different Laws. Which ſhews that this could not be the Original of the Common Law: Becauſe theſe Laws were ſtill in Being, and were ſeverally obſerved in ſeveral Places, in the ſame Manner, as at this Day ſeveral particular Cuſtoms are, which are peculiar to ſome particular Counties and Places; and yet that does not hinder them from being call'd Part of the Common Law of *England*. So that it muſt be meant only, that *Edward* the Confeſſor made a Collection out of thoſe Laws then extant, as *Alfred* did before him; and then ordering thoſe to be obſerved, which had not been obſerved in the ſhort Reigns of *Harold* and *Hardicanute*, he may well enough be called the Reſtorer of the *Engliſh* Laws. From hence it ſeems pretty clear, that the Common Law of *England* had a much antienter Original than that of *Edward* the Confeſſor; and that it really was formed and eſtabliſh'd by King *Alfred*, and had the Name of *Folcright*, that is, *Jus Publicum* or *Commune Jus*, which, when the Language came to be alter'd, was call'd the Common Law of *England*. For it is plain it could not have that Name in *Edward* the Confeſſor's Time, for then they ſpoke *Saxon*; nor in *William* the Conqueror's

refuted,

and this matter explained.

queror's Time, for then they ſpoke *French*: So that it can't be true that the Term, Common Law, came from *Edward* the Confeſſor, but the Thing itſelf really and truly under the Name of *Folcright*, was in Being long before. And as thoſe Laws were then call'd the *Folcright*, and really the Common Law of *England*: So the preſent Common Law is in Subſtance the ſame, tho' it hath undergone divers Alterations.

The Objects of the Saxon Laws.

He that will look into the *Saxon* Laws, and read them in their native Tongue, will find as clearly as can be, the Foundation and principal Materials of this noble Building; he will find the Peace of God and Holy Church in the firſt Place provided for, and the true Religion ſecured; and for that Purpoſe, Laws are made for keeping the Sabbath, for the Payment of Tithes, Firſt Fruits, and other Church Duties; and then follow Laws for the Security of the State, as againſt Treaſon, Murder, Manſlaughter, *Se Defendendo*, Chance-Medley, Robbery, Theft, Burglary, Witchcraft, Sorcery, Perjury, Adultery, Slander, Uſury, and many other Crimes. Here you will alſo find Laws concerning fraudulent Sales, Warranty, Juſt Weights and Meaſures, Repairs of Highways, Bridges, Waging of Law, Outlawry, Treſpaſſes, Batteries, Affrays, Trial by Juries, Court-Leets, Court-Barons, View of Frankpledge, Hundred Courts, County Courts, Sheriffs Turns, Heriots, Copyhold, Freehold, and many other Matters too tedious to enumerate.

King *William* I. confirmed the *Saxon* Laws

The *Normans*, who invaded the *Saxons*, did not ſo much alter the Subſtance, as the Names of Things. And notwithſtanding the pretended Conqueſt of *William* the Firſt, theſe Laws of good King *Edward* were not aboliſh'd by him; for when King *William* publiſhed thoſe Laws, he expreſly mentions them to be *Edward* the Confeſſor's Laws, and publiſhes them as ſuch, and confirms and proclaims them to be the Laws of *England*, to be kept and obſerved under grievous Penalties. Beſides, upon ſuch Confirmation, he took an Oath to keep inviolable the good and approv'd antient Laws of the Realm, which the good and pious Kings of *England*, his Anceſtors, and eſpecially King *Edward*, had enacted and

by Oath,

ſet forth; ſo that the *Engliſh* Laws were plainly then in uſe and not abrogated by *William* the Firſt. Now theſe Laws of *Edward* the Confeſſor, were not only ſuch as *Edward* the Confeſſor himſelf framed, and were enacted in his Time; but the Subſtance of all the Laws made, not only in his Grandfather King *Edgar*'s Time, but in the Reign of other *Saxon* Kings his Anceſtors, for many hundred Years before him, that is, the whole Body of *Saxon* Laws. And this will appear to be ſo upon Examination, even from the Laws themſelves, which is an Evidence that cannot lie; for many of the Laws of *Edward* the Confeſſor, are the very ſame as in former *Saxon* Kings; and many Expreſſions and Words, and moſt of the Terms in *William* the Firſt's Laws, are mere *Saxon*, and derived from that Language, but put into *Norman French*; inſomuch that any Man will find it difficult to underſtand thoſe Laws perfectly well, unleſs he has ſome Knowledge of the *Saxon* Language. And from thence it is, that the Tranſlator of the Laws of *William* the Firſt, in ſome places puts the *French* Words in the *Latin* Tranſlation, where he is at a loſs for the true Meaning of the *Saxon* Term diſguiſed in a *Norman* dreſs.

viz. The *Saxon* Laws of antient Kings, *&c.*

Henry I. promiſes to obſerve the ſame Laws of good King *Edward*, and grants to his People *Lagam Edwardi Regis*, the Laws of King *Edward*, but yet afterwards he impoſed ſome new Laws, which were a Medley out of the *Salic*, *Ripuarian*, and other Foreign Laws, with ſome Peices out of *Knute*'s Laws, but theſe were but a ſmall Time obſerved. Afterwards King *Stephen*, *Henry* II. and *Richard* I. confirm the ſame Laws of King *Edward*. And King *John*, after much ſtruggle with his Barons, ſwears to reſtore the good Laws of his Anceſtors, and eſpecially the Laws of King *Edward*; and confirms theſe Laws by way of Schedule or Charter, which is the ſame in Subſtance as *Magna Charta*, confirmed afterwards by *Henry* III. And to make the ſame more effectual, this great Charter rais'd on this Baſis, is by Act of Parliament in *Edward* the Firſt's Time commanded to be allowed by the Juſtices in their Judgments and Reſolutions as the Common Law of *England*.

King *Henry* I. promiſed to obſerve them.

King *Stephen*, *Henry* II. and *Richard* I. confirmed them.

King *John* ſwore to reſtore them.

King *Henry* III. confirmed them.

Magna Charta founded on them.

King *Edward* I. in Parliament confirmed them.

Thus we find the Stream of the Laws of *Edward* the Confeſſor, flowing from a *Saxon* Fountain, and containing the Subſtance of our preſent Laws and Liberties, ſometimes running freely, ſometimes weakly, and ſometimes ſtopped in its Courſe, but at laſt breaking thro' all Obſtructions, hath mixed and incorporated itſelf with the great Charter of our *Engliſh* Liberties, whoſe true Source the *Saxon* Laws are, and are ſtill in Being, and ſtill the Fountain of the Common Law. Therefore it was a very juſt Obſervation of my Lord *Coke*, who ſays, that *Magna Charta* was but a Confirmation or Reſtitution of the Common Law of *England*; ſo that the Common Law really is an Extract of the very beſt of the Laws of the *Saxons*. And where my Lord *Coke* ſays that an Act of Parliament made againſt *Magna Charta* is void, he is not to be underſtood of every Part of it, but it is meant only of the moral Part of it, which is as immutable as Nature itſelf; for no Act of Parliament can alter the Nature of Things, and make Virtue Vice, or Vice Virtue.

Lord *Coke*'s Obſervation to the ſame Purpoſe.

The Laws of *Edward* the Confeſſor are mentioned to be obſerved in the antient Oath of the Kings of *England* uſually taken at their Coronations. Now this would be not only a ſuperfluous but an impious Vanity for the Kings of *England* to take this Oath, if there were no ſuch Laws in Being to be obſerved; for he ſwears to keep the antient Laws and Cuſtoms, and eſpecially the Laws, Cuſtoms and Liberties, granted by the glorious King *Edward* to the Clergy and People: So that from hence it plainly appears that even *Magna Charta* itſelf, which contains the ſubſtantial Part of the Laws and Liberties of *England*, and which ſupports the main Pillars of our Laws, is a great Branch ſprung from a *Saxon* Root, and was raiſed and collected out of the great King *Edward*'s Laws, who culled and choſe them out of the beſt of the Laws of the *Saxon* Kings his Predeceſſors.

The antient Coronation Oath mentioned them.

Now of this Body of *Engliſh* Laws, the moſt ſublime and excellent Part is the Conſtitution; upon which depend, and from which naturally flow, all other our municipal Laws, which concern Religion, Life, Liberty or Property. Every Body

The Conſtitution the moſt excellent Part of the Laws.

Body at firſt ſight muſt perceive our Government is not abſolute or deſpotic; nor are our Laws calculated for Slavery; for as my Lord *Clarendon* ſays, more miſerable Circumſtances this Kingdom cannot be in, than under abſolute Government and Popery. But tho' our Government be not abſolute, yet it is as truly Monarchical, and as Powerful and Great, as the moſt arbitrary Kingdom whatſoever. And it is a moſt certain Truth, that a Monarch of *England*, at the Head of an *Engliſh* Parliament, is the greateſt Monarch, the moſt Potent and happieſt Prince in the World.

Lord *Clarendon*'s Teſtimony.

Our Scheme of Government is, without Doubt, the nobleſt, the moſt juſt and moſt exact, that perhaps ever was contrived; for it provides for the Security and Happineſs of every Individual, tho' never ſo inferior, and yet at the ſame Time eſtabliſhes the Glory of the Prince; it ſecures the Liberty of the People, and yet ſtrengthens the Power and Majeſty of the King. One inſtance of the great Liberties of the People of *England* I can't forbear to mention, and that is, the *Habeas Corpus* Act, which is the greateſt Bulwork that can be againſt arbitrary Power, and therefore not to be found in any Nation but this; and to illuſtrate this, I will mention a Caſe which is in Sir *Bartholomew Shower*'s Reports, Second Part, Page 484. *The King* verſus *Brown*, The Caſe was upon a *Habeas Corpus*, and it appeared the King had requeſted ſome of his Miniſtry to commit the Defendant to Gaol, but they not having Evidence of the Defendant's Guilt, refuſed to grant any Warrant, upon which his Majeſty thinking the Defendant guilty, called for a Warrant, which he ſigned with his own Hand, by which the Defendant was committed to the Cuſtody of a Meſſenger; and the Warrant being taken Notice of by the Court, and the whole Matter being conſidered, the Court gave their Opinion, that the Defendant ſhould be diſcharged, becauſe the Warrant was under the King's own Hand, and not under the Hand of any Secretary or Officer of State, or Juſtice of Peace. The Reaſon given for this has been, that the King having given all the executive Power to his Judges and Juſtices of Peace, there is none left in him, the executive Power being too mean and troubleſome to his Majeſty,

and if the King err'd never ſo much there is no Remedy againſt him, but there is a Remedy at Law againſt any Subject whatſoever. And it is certainly true what the ſame noble Lord ſays in his Hiſtory of the Civil Wars, That our *Conſtitution* is one of the plaineſt Things in the World, and ſuch as every Body muſt needs ſee and feel, if we would make but an honeſt Uſe of our Underſtanding; yet out of what Principle I will not ſay, it is often moſt miſerably miſtaken, or at leaſt miſrepreſented. Praiſe of the Conſtitution,

And if any of the Enemies of our Conſtitution ſhould at any Time have Power to alter this happy Scheme, I am apt to think it would be, as Sir *William Temple* ſays, like a Pyramid reverſed, it might ſtand for a Time, but could not have any long Continuance, but upon its own firm and natural Baſis. and Sir *William Temple's* Opinion.

Having been ſomething acquainted with the *Saxon* Tongue, and finding ſo many Words in our Law Books intirely *Saxon*, and bordering thereon, I can't forbear to make ſome Remarks on the Language, and at the ſame Time to obſerve the great Affinity between our Language and the *Saxon*, and to be thereby put into a Way to trace the Original of the *Engliſh* Tongue. The Inſtances I ſhall produce are generally ſuch as are moſt uſeful; and the Tranſlation of my *Saxon* Quotations, I ſhall render not the moſt Elegant, but ſuch as do moſt exactly expreſs the Senſe, and agree with the *Saxon* Tongue, for the Encouragement of ſuch young Students in the Common Law, as ſhall think it worth their while to look into that Language; which if they do, I will aſſure them it will ſet them much beyond their Brethren. 'Tis enough, in order to recommend the *Saxon* Tongue to all curious Men and Philologiſts, to ſay, it is the Mother of our *Engliſh* Tongue, and conſequently to have a compleat Knowledge of it, the *Saxon* muſt certainly be very uſeful. A Man can't tell Twenty, or name the Days of the Week, but he muſt ſpeak *Saxon*; and it ſeems not becoming a Man of Learning to do that, and daily to do it, and not to know what Language he ſpeaks. This Language will help him to Multitudes of Etymologies, which he cannot Affinity of the *Saxon* and *Engliſh* Language

uſeful to be known.

learn from any other, and ſuch as are uſeful in Converſation and Buſineſs. And tho' an Etymology ſtrictly ſpeaking, is no more than a Derivation of the Word or Name; yet Etymologies from a *Saxon* Original will often preſent you with the Definition of the Thing in the Reaſon of the Name. For the *Saxons* often in their Names expreſs the Nature of the Thing; as in the Word *Pariſh*, in the *Saxon*, it is Inſtances of the Significancy of the *Saxon* Language. Pꝛeoꝛt-ꝛcyꝛe, *Preoſtſcyre*, which ſignifies the Precinct of which the Prieſt had the Care, in *Engliſh*, *Prieſt-ſhire*. So Ealdoꝛman-ꝛcyꝛe, *Ealdorman-ſcyre*, is the Diviſion or Precinct over which the Earl heretofore, as now the Sheriff, had Dominion or Juriſdiction, which we now call a County; in *Engliſh* the Alderman's or Earl's Shire. Throne in *Saxon* is expreſſed by the compound Word Ðꝛym-ꝛetle, *Thrym-ſettle*, that is, the Seat of Majeſty. A Lunatick is call'd Monað-ꝛeoc, *Monath-ſeoc*, that is, one who is Sick every Month, or Moonſick; and one poſſeſs'd with a Devil, is call'd *Deofel-ſeoc*, Deoꝛel-ꝛeoc, or *Devil-ſick*. The *Saxon* Word Eoꝛð-ȝemet, *Eorth-gemet*, Earth-mete or Earth-meaſure, ſignifies juſt the ſame as the *Greek* Word *Geometria*, Geometry, and is a compound of the like Words; for Eoꝛð, *Eorth*, ſignifies Earth, and Gemet, *Gemet menſura* or Meaſure. And had we not loſt this old *Engliſh Saxon* Word Eoꝛð-ȝemet, and taken into its Place the Word *Geometry* from the *Greeks*, People could never have been ſo ſilly, as to ſay, as is uſually ſaid of a nice Piece of Architecture, that it hangs by Geometry; for the common People in thoſe Days knew what was meant by the Word then uſed, as well as the beſt *Grecian* by that which is ſubſtituted in its Place.

A probable Conjecture thereupon. From hence one might be tempted to think that the common People in the Time of the *Saxons* underſtood more than the common People now, or at leaſt were leſs expoſed to miſtake; becauſe the Words of their Mother Tongue were more comprehenſive and ſcientifical, and leſs liable to give them wrong Ideas. So the *Saxon* Word Ge̊ꝛim-cꝛæꝛtiȝ, *Gerim-cræftig*, expreſſes an Arithmetician as well as the *Greek* or *Latin Arithmeticus*; indeed it expreſſes it more fully, for Ge̊ꝛim ſignifies Number, and cꝛæꝛtiȝ is crafty or knowing, that is, one knowing, ſkilled, or ſkillful in Numbers,

bers, whereas the *Greek* imports only a Number, or one that hath ſome Relation or other to Numbers; and this was underſtood by every *Saxon* Yeoman, without the Aſſiſtance of any other Tongue. Now this ſhews that we had no neceſſity of taking in theſe *Greek* Words into our Language, to expreſs the Idea, which was as well expreſſed before, but only out of Delicacy, becauſe they ſeem'd to have a better ſound. When the Words which ſtood for Arithmetick, Geometry, Aſtronomy, Rhetorick and Grammar, were ſpoke among the *Saxons*, every one underſtood them; but now, having ſubſtituted *Greek* Words in their Places, they are not underſtood by any but the Learned, tho' every Body would underſtand them, had they been continued in our own Language. So an Aſtronomer, Rhetorician and Grammarian, in that Language are expreſſed by Tungol-cpæptiʒ, *Tungol-cræftig*, ðpæc-cpæptiʒ, *Spræc-cræftig*, and ðtæf-cpæptiʒ, *Staf-cræftig*; Tungol is a Star, ðpæc is a Speech, and ðtæf is a Letter. Now theſe expreſs the Ideas more fully than the *Greek*; importing one ſkilful or ſkill'd in Stars, in Speech, and in Letters. Hence it is that the Learn'd *Iſaac Caſaubon* ſays, this Language is a great Imitator of the *Greek*.

The Subſtitution of *Greek* Words was unneceſſary.

This Obſervation of the *Saxon* Compounds, directly overthrows that vulgar Error, that the *Saxon* Language conſiſts moſtly of Monoſyllables. It is true indeed, that moſt of our *Engliſh* Monoſyllables come from the *Saxons*, but they have a vaſt Variety of Compound Words, and ſome of ſeven or eight Syllables, and often compound into one ſingle Word three or four Words uſed in *Latin* or modern *Engliſh* to expreſs the ſame Thing; as the Dioceſe of the Biſhop of *London*, in *Latin*, *Præfectura Epiſcopi Londinenſis* is expreſſed by one Word in the *Saxon*, London-ceaptep-biſcop-ſetle, *London-ceaſter-biſcop-ſettle*, the Biſhop of *London*'s Seat or See. So Cantpapa-byriʒ-cyrica, *Cantwara-byrig-cyrica*, in one Word, ſignifies the Church of the City of *Canterbury*, in *Latin*, *Eccleſia Cantuarienſis*. Un-ʒelyfendlic, *Un-gelifendlic*, ſignifies not to be believed; Un-ʒeþeahtendlice, *Un-getheahtendlic*, without forethought; Un-ʒeþitnigendlice, *Un-gewitnigendlic*, without Puniſhment, or Scotfree. So that in Compounds this Language is very happy, wherein are expreſs'd the Qualities, Re-

A vulgar Error noted, that the *Saxon* conſiſted moſtly of Monoſyllables.

lations

lations and Affections of Things conſpicuouſly and elegantly. Death is expreſſed by Gaſt-gedal, *Gaſt-gedal*, which Word for Word ſignifies the Separation of the Soul from the Body, or Soul-ſeparation; Gaſt, *Gaſt*, ſignifying Ghoſt or Soul, and Gedale, *Gedale*, Separation. What ſad Work does a vulgar Capacity make of the hard Words *Orthodox* and *Hæretick*; when, ſhould you have ſpoke the ſame Things in the *Saxon* Language, wherein Orthodox is expreſs'd by riht-geleaf-full, *Right-geleaf-ful*, one who was full of, or had a right Belief; and Heretick by Dpol-man, *Dwol-man*, one who dwells in Error; the plaineſt *Saxon* Churl would have underſtood you; nor could he here have underſtood the Terms without the Thing; nor was there need of School-Learning to underſtand thoſe Terms. How elegant is the Word *Phariſees* expreſs'd among the *Saxons*, who call'd them ſundor-halgena, *Sundor-halgena*, or ſeparate holy, Men holy apart by themſelves, of a Holineſs whereby they were ſeparated and diſtinguiſh'd from others; ſundor, *Sundor*, ſignifying apart, and halgena, *halgena*, *holy*. This is the Language, in which the earlieſt Royal Progenitors of our moſt renown'd and excellent King founded the true Religion among us; in this Language they received the Chriſtian Religion, and the joyful Tidings of the Saviour of the World. In this Language the antient Fathers of our Country, the pious *Saxon* Kings, laid the happy Foundations of our Liberties and our Laws. Here you may ſee how they guarded their Religion by their Laws. They prohibited by an expreſs Law, not only to exerciſe any Calling, but to do or tranſact any worldly Buſineſs on the Sabbath-day; and this Law not being ever repeal'd, as we know of, nor (as is to be hoped) ever grown into ſuch univerſal Diſuſe, as to induce a Probability of a Repeal, why ſhould it not be the Common Law of *England*? So ſtrict were our pious Anceſtors in keeping this Day holy, that they made a Law, that if a Villain or Slave did work on the Sabbath-day, if it was by his Maſter's command, he thereby became free, and the Lord was to forfeit Thirty Shillings, which was then near as much in Quantity as Five Pounds now; but if ſuch Work were done of his own Head, without his Maſter's Knowledge, the Villain or Slave was then to be whip'd. And if a Servant who was free, broke the Sabbath without his Maſter's

The Piety of *Saxon* Kings

particularly with reſpect to the *Sabbath*.

Maſter's Command, he thereby became a Slave, or elſe was to forfeit ſixty Shillings, a vaſt Penalty for a Servant in thoſe Days; and in caſe a Prieſt did offend in this Nature, he always was by their Law (in this Caſe, as indeed in all other) to forfeit double what a Layman was to forfeit: becauſe they thought he was more inexcuſable, as knowing his Duty better, and the Example would do double the Miſchief. The Ten Commandments were made Part of their Law, and conſequently were once Part of the Law of *England*; ſo that to break any of the Ten Commandments, was then eſteem'd a Breach of the Common Law of *England*; and why it is not ſo now, perhaps it may be difficult to give a good Reaſon.

The Ten Commandments part of the *Saxon* Laws.

To a Lawyer, even a Practiſer at the Bar, this Language cannot but be of great Uſe, ſince the very Elements and Foundations of our Laws are laid in this Tongue; and for want of it, the very Terms of our Law are ſometimes miſtaken, and often not throughly underſtood; for we have many Law Terms which ſeem to be *French*, yet are only diſguiſed in a *Norman* Dreſs, and really have a *Saxon* Original. As to inſtance in one Word inſtead of many; we read in the Common Law many Things concerning *Name*, *Nam*, *Naam*, ſometimes *Namps* and *Nams* ſignifying a Diſtreſs, which in the barbarous *Latin* is *Namium*, and from thence comes *Namatio*, and the Verb *namare*, to deſtrain. All which are plainly *Saxon* Words turn'd into *French* and *Latin*, and come from the *Saxon* Verb niman, *niman*, *capere*, to take, which when underſtood, ſerves very much to clear up all that intricate and abſtruſe Learning *de Namio*, and to put an End to the Diſputes about the Difference between *Vetito Namio* and *Withernam*, about which many, as my Lord *Coke* ſays, have err'd, thinking they were the ſame. Now he, to ſhew the Difference, appeals to the Etymology of the Word *Withernam*, and ſays it comes from the two *Saxon* Words *Weder* and *Naam*; *Weder*, ſays he, which common Speech has turn'd to *Oder* or *Other*, and *Naam* which comes from the *Saxon Nemmem* or *Nammem*, to take hold on or diſtrain. Now they who are acquainted with the *Saxon* Tongue, know that there are no ſuch Words as theſe in

The *Saxon* Language of great Uſe to Lawyers.

Inſtance.

that Language; yet this is to be reckon'd *Vitium Sæculi* only, and not to be imputed to that great Man, but to the want of Books and other Helps to the Underſtanding that Tongue: However the Meaning of thoſe Words which my Lord *Coke* ſuppos'd to be true *Saxon*, being much the ſame with the true *Saxon*, his Argument remains as ſtrong and forcible, and at the ſame time the Error argues a ſtrong Neceſſity of Underſtanding this Language, to clear up ſuch Difficulties.

Withernam, its true Derivation.

For the true Derivation of *Withernam* is from the *Saxon* Word ꝓiþep, *wither*, which ſignifies *contra*, contrary; and *nam* or *nim*, *captio* or taking, that is *contra captio*, contrary taking, or taking by way of Repriſal, which is the true Meaning of this Word: and to ſearch for any other Original is in vain. This clearly explains what is meant by taking Goods in *Withernam*, which is no more than to take other Goods of *John a Stiles*, in Lieu of Goods which he took under colour of Diſtreſs, and will not deliver when required by Law. So in the Caſe of the Writ called *De homnie replegiando*, which iſſues to deliver up the Perſon of another when he is detain'd againſt Law; if he who had the Cuſtody of him, has diſpoſed of him elſewhere, ſo as that he is not delivered according to the Command of that Writ, another Writ goes out which is called a *Capias in Withernam*, which is to take his Body by Way of Repriſal. This Word *Withernam* alſo ſignifies Repriſals taken at Sea by Letter of Mart-Ships. The Words *Naam*, *Nam* and *Nim*, come from the *Saxon* Verb nıman, *Niman*, *capere*, to take, and ſtrictly ſignify Taking, but figuratively the Thing taken; and thence it is, that *Namps* and *Namium* come to ſignify a *Diſtreſs*; as where Mention is made of thoſe who hold Plea *de Vetito Namio*, the Meaning is, holding Plea of Diſtreſſes taken and forbid to be replevied.

Law *French* inſufficient without *Saxon*, &c.

This Inſtance ſhews how precarious it is, to borrow Etymologies from others, and to truſt to Tranſlations for the very Terms of our Laws. 'Tis too common an Opinion among thoſe who ſtudy the Law, that the Knowledge of Law *French*, as they call it, is ſufficient for making themſelves Maſters of their Profeſſion; whereas 'tis plain, that

having Recourſe to the *Saxon* Originals is of great Uſe, not to ſay Neceſſity, to a perfect Knowledge of the true Reaſon of the Law, which for want thereof is ſo often and ſo groſſly miſtaken. Indeed, without being acquainted with the Law *French*, wherein ſo much of our Law yet in force is written, a Man cannot pretend to the Name of a Lawyer; but by adding the *Saxon* to it, both the *French* and the Laws therein wrote will be much better and more clearly underſtood.

Writing Reports in Law *French* reprehended.

And here I cannot but obſerve, that while the *Saxon* is totally neglected, ſome not content to learn the Law *French*, for what is already wrote in it, ſeem fond of the Uſe of it, and of writing new Things in it; but for what Reaſon I am at a Loſs: and at a greater yet, why any Lawyer ſhould write Reports in that Tongue. The beſt Law *French* is that which we find in the old Statutes and Year-Books, which is ſuppos'd to be that Tongue, which the *French* ſpoke about the Time of *William* the Firſt, and ſometime after: That is to ſay, it is the Speech which the *French* themſelves have laid aſide as impure for above Five hundred Years. So that the Law *French* is nothing but the barbarous unpoliſh'd Beginning or Chaos of the Modern *French*, and ſeems in my Opinion, to ſerve for little elſe but to cramp good Senſe, and confine the beſt Reaſoning, within the narrow Limits of a Tongue form'd in the Ignorance of Times. And can any *Engliſhman*, whoſe native Tongue far exceeds the *French* after all its Refinement, value himſelf upon writing in that which is the Refuſe of the *French* Language? But if we conſider the preſent State of Law *French*, as uſed by ſome modern Reporters, wherein all the Antiquated true *French* is loſt, and inſtead thereof *Engliſh* Words ſubſtituted with *French* Terminations tack'd to them; this ſtill makes it worſe, and thereby it is become even the Corruption of an imperfect and barbarous Speech, underſtood by no Foreigner, not even by the *French* themſelves, ſerving only as a Mark of our Subjection to the *Normans*, and for the Uſe of which the *French* deſpiſe us. Nay, can any *Engliſhman* write in this Tongue, and not bring to Mind that ſlaviſh Deſign of *William* the Firſt, totally to extinguiſh and aboliſh the noble

noble *Engliſh* Language; for which Purpoſe he made a Law, that all Pleadings in Court, and Arguments at the Bar and on the Bench, ſhould be in *French?* But the Deſign fail'd, for tho' this might ſtop the Progreſs of our Language, it could not extirpate it, altho' that Law continued till 36 *E.* 3. when a Law was made by that great King, for the Reſtoration of the *Engliſh* Tongue. The true Reaſon of that Statute is given in the Preamble; that in foreign Countries Juſtice was always obſerved to be beſt done, where their Laws were ſtudied and practiſed in their own Language. I ſhall then leave it to be conſidered by thoſe who publiſh Reports in Law *French*, whether it is not a Diſhonour to our Nation, an Affront to our Language infinitely preferable to that of the *French*, and a Compliment paid even to the Barbarity of that People? Whether it is not doing injuſtice to every eloquent and learned Judge upon the Bench, and to every good Speaker at the Bar, and miſerably enervating the Arguments of every elegant Reaſoner? It is not in the Power of that Language, even in its Purity and higheſt Improvement, to repreſent a good Maſculine *Engliſh* Speech; and were it never ſo perfect a Language, a Tranſlation can never come up to the Original; and writing Reports in *French*, is nothing but preſenting the World with Tranſlations inſtead of Originals.

Study of the *Saxon* Language will cauſe an Acquaintance with their Laws.

But to return to the Uſe of the *Saxon* Tongue; a Lawyer has this farther Advantage from the Knowledge thereof, for it will bring him acquainted with a Body of Laws made under our *Saxon* Kings for the Space of about Five hundred Years, as yet extant in this Language, and moſt of them printed and tranſlated by Mr. *Lambard.* And now there are added King *Ethelbert*'s Laws, the firſt Chriſtian King of the *Saxons*, by Mr. *Wilkins*, intitled *Leges Anglo Saxonicæ*, which Work is an Improvement of *Lambard*'s Tranſlation. 'Tis endleſs to recount the Miſtakes of great Lawyers, Hiſtorians, Geographers, Lexicographers and Antiquaries, for want of ſome Knowledge in this Tongue. The Mention of a few of them may be of Uſe, to incite young Gentlemen to ſtudy a Language, the want whereof has betray'd ſome great Men into Miſtakes; and for that End only, and not

out of any Vanity of ſhewing their Failings, but with all due Regard to their Characters, I ſhall produce ſome Inſtances. This Language was very little known in my Lord *Coke*'s Time, who had ſmall Aſſiſtance therein, and few Opportunities of being acquainted therewith, without ſpending more Time than it was poſſible for him to ſpare from his more neceſſary Studies; elſe his Etymologies would have been much more exact. He ſays in his firſt Inſtitutes, that the Word *Heriot* comes from the *Saxon Heregeat*, that is, from *Here*, Lord, and *geat* beſt, as much as to ſay, the Lord's beſt; but this is very wide of the true Derivation, for Heregeat, by the *Saxons* wrote thus Hepegeat, among them ſignified *Bellicus apparatus*, Armour, Weapons or Proviſion for War, from the *Saxon* Word Hepe or *Here*, which ſignifies an Army, and ȝeat or ȝeot, *fuſus, effuſus, quaſi fuerit quid in Exercitum erogatum*, and was a Tribute of old given to the Lord of a Manor, for his better Preparation towards War; and therefore at their firſt Inſtitution, they were paid in Arms and Habiliments of War, as you will ſee among the Laws of King *Canutus*. One of the King's Thanes was to pay for his Heriot, four Horſes, two of them equipp'd, two Swords, four Spears, and as many Shields, a Helmet, and a Coat of Mail.

Inſtances of Errors occaſioned for want of knowing the *Saxon* Language.

So that it ſeems this Heriot was ſo far from being the beſt Beaſt, that it was rather the beſt Arms. And indeed, this was an Invention of King *Canutus*, to ſupply the Want of his *Daniſh* Army, which he had diſbanded at the Importunity of his Subjects, by procuring great Part of the Arms of his Kingdom to be given to him, and to Lords of Manors under him, as a Tribute. This ſhews likewiſe how this Service of *Heriot* differs from that of a *Relief*, which is confounded by many Writers with the Heriot, as tho' they were the ſame; but we never read of any ſuch Thing as a Relief among the *Saxons*. In Proceſs of Time, this Heriot came to be paid in Goods, Beaſts, and now very often in Money.

So my Lord *Coke* brings the Word *Huſling* from two *Saxon* Words Hur, *hus*, a Houſe, and Ding, Thing, whereas the

Word is a pure *Saxon* Word, wrote thus, Huſtinge, *Huſtinge*, and in that Language ſignifies *Concilium*, any Council in general, or a Court. And therefore it was applied to the Supreme Court of the City of *London*, called the Court of *Huſtings*; which is of *Saxon* Extract, and heretofore was held every *Monday*. In this Senſe you find the Word uſed in *Cron. Sax. An.* 1012. They took the Biſhop, that is, *Elphegus*, and led him to their *Huſting*, *i. e.* Council.

It is ſaid by my Lord Chief Juſtice *Holt*, in *Keyling*'s Reports, in the Caſe of *The Queen* and *Mawgridge*, that Murder was a Term, no where uſed but in this Iſland, and was a Word framed in the Reign of King *Canutus*, upon a particular Occaſion; and for that he quotes a Law of *Edward* the Confeſſor in the following Words, *Murdra quidem inventa fuerunt in diebus Canuti Regis.* But this Word *Murder*, is a *Saxon* Word, and to be found in ſeveral Places in the antient *Saxon* Laws, and is of a very antient Date, probably as old as the *Saxon* Tongue it ſelf, which is about Five hundred years older than *Canutus*'s Time.

We frequently in *Saxon* Authors find the Words Morþur, *Morthur*, Morðer, *Morther*, and Morðor, *Mordor*, *Murther*, or *Murder*, and theſe come from the antient *Saxon* Word Morð, *Morth*, which ſignifies a violent Death, or ſudden Deſtruction, and ſometimes ſignifies *Murder* in the preſent Senſe of our Common Lawyers. From hence comes the barbarous *Latin* Term *Mordrum* and *Murdrum*, and the Verbs *Mordrare*, *Murdrare*, *Mordridare*, which are of much greater Antiquity than King *Canutus*, who began his Reign but in 1016. Now give me Leave to mention the true Derivation of our Word *Murdrare*, which I think manifeſtly comes from the *Latin Morti dare*, which I hope will be allowed to be true *Latin*, and not barbarous.

From hence it ſeems pretty plain, that this Term was not only uſed in foreign Countries, but is of very great Antiquity among them, and common to almoſt all the *Northern* Nations.

And as the Term *Murder* was frequent among the *Saxons*, ſo from them we had our Law Word *Manſlaughter*, which manifeſtly comes from the *Saxon* Word Manſlyhte, *Manſlyte*, and among King *Ina*'s Laws, there is a Title of Laws call'd Be Manſlyte, *Manſlyte*, *de Homicidio*; and the Crime there mention'd is Manſlaughter only in the Senſe of our Laws.

The Lawyer will find a farther Uſe of the *Saxon* Tongue, in reading antient Grants and Charters of Princes, Foundations of Churches, and Biſhops Sees, the Bounds and Limits of Counties, Towns and other Precincts, which are not well to be underſtood without the Aſſiſtance of this Language. The firſt Charter of the City of *London* which is extant is wrote in the *Saxon* Tongue, procured by the then Biſhop of *London* from *William* the Firſt, but is no where, that I know of, well tranſlated.

How lame are all our Law Dictionaries in reſpect of the *Saxon* Etymologies? It is frequent to find, not only one Letter for another, but ſometimes one Word for another, and oftentimes Words ſet down for *Saxon*, never heard of before; and not underſtanding this Language they tranſcribe one from another, ſo that the Editions, inſtead of being better, are worſe and worſe, and the laſt Edition becomes more corrupt than the firſt.

There was once a Diſpute in a Court of Juſtice in which I was Counſel, and it was upon Leaſe, wherein there was a Reſervation of Rent, half-yearly at *Rudmaſs-day*: This *Rudmaſs-day* puzzled the Counſel grievouſly, and they knew not what to make of it; they had never heard of St. *Rudmas*, nor could find any ſuch Saint in all the Calendar; at laſt when it was unfolded by me that Rode, *Rode*, ſignified a Croſs, and *Maſſeday* or *Meſſeday*, ſignified a Feaſt-Day; then the Matter was plain, the Expreſſion ſignifying *Holy-Croſs-Day*, or the Feaſt of the Holy Croſs, and the half yearly Reſervation at *Rudmaſs-day* referred to the two Feaſts of the Holy Croſs; the one whereof is the third of *May*, which is called the Invention of the Croſs, and the

the other is the Exaltation of the Croſs, which is the fourteenth Day of *September*, and known to this Day to all concerned about Veniſon, by the Name of *Holy-rood-day.*

In the Caſe of *The Queen* and Serjeant *Whitaker*, which was in the Queen's Bench, *Trin.* Term in the fourth Year of Queen *Anne*, on a *Mandamus* to reſtore the Defendant to the Place of Recorder of *Ipſwich*; if the Force of the *Saxon* Word þic, *Wic*, and the Manner of ſpeaking familiar amongſt our Anceſtors, had been thoroughly conſider'd, there would not have been ſuch a long Diſpute, whether there was a Variance between *Villa de Gippo* and *Villa de Gippo-Vico.* For in *Saxon* the Word þic, in *Engliſh Wich*, ſignifies a Town, but is oftentimes in that Language made alſo a Termination to the Name of a Town, which yet is a compleat Name without it; and ſo ſignifies only emphatically, and not any thing different from the Name of the Town, as London-þic, *London Wic*, that is, *London* Town, is the ſame as *London*, and ſignifies no more, tho' *London* be the compleat Name, and without the Word þic, *Wic*, would ſtill have been the ſame. So the Shire or County of *Devon*, in the old way of ſpeaking would, or might at leaſt, be called the County of *Devonſhire*, which is the conſtant Expreſſion in old Deeds, and ſignifies the ſame Thing, tho' it be tautologous; nor did any one ever imagine that the County of *Devon*, and the County of *Devonſhire*, were two different Counties, altho' *Shire* here has juſt the ſame Relation as þic, *Wic*, in the other Caſe: So that the moſt that can be made of it is, that it amounts to a Tautology, antiently very familiar, but can't be a Variance, or ſignify a different Thing.

The Author's Reaſon for being ſo copious upon this Head.

I did not think of being ſo particular in this Matter, but I take Satisfaction in doing it, for the Sake of the young Students and Barriſters at Law, many of which I have the Honour to know, and from whoſe early Genius, good Learning, and great Induſtry, the World may be in hopes of ſeeing as good a Syſtem of Laws, as any whatſoever. I am perſuaded the Law of *England* is capable of ſuch an Improvement, was there the ſame Encouragement as in other Coun-

tries to do it: And were ſuch a Work encouraged by the Publick, which would be to the Honour of the Nation, I doubt not but there would be found among our Lawyers, Men of Learning and Abilities equal to ſuch an uſeful Undertaking. Sir *Matthew Hale*'s *Analyſis* has ſhewn what of this Nature may be done, if ſuch a Thing were thoroughly encouraged, tho' perhaps the Foundation ſhould be laid a little deeper than his has been.

This Knowledge uſeful to the Divine.

Nor is the Knowledge of this Language uſeleſs even to the Divine, or indeed to any ſuch as have a mind to ſtudy the Antiquities of the beſt conſtituted Church in the World, the Church of *England*. By the antient *Saxon* Monuments we are able to demonſtrate, that the Faith, Worſhip and Diſcipline of our Holy Church, is in great Meaſure the ſame with that of the primitive *Saxons*, and that ſhe is reform'd only from the Corruptions of the Church of *Rome*; the Novelty of many whereof theſe will enable us to diſcover. Here we find the Government of the Church, conſtantly under Biſhops, to be as antient as the Chriſtian Religion with us, and that in the earlieſt Times their Power and Authority exceeded even that of the Temporal Lords.

Here you'll find no Supremacy claimed by *Rome*, and St. *Paul* oftentimes declared equal, and ſometimes Superiour to St. *Peter*; for he has ſometimes the Name of ſupreme Teacher in Holy Church given to him, in theſe Words, which are in *Saxon*, but the *Engliſh* is thus expreſſed: *St.* Paul, *who is the higheſt Teacher which we have in Holy Church:* Poſſibly *Rome* had not then reſolved to derive her Supremacy from St. *Peter*, nor did our Anceſtors it ſeems allow that Title, ſince St. *Peter* was not eſteem'd ſo high as his Brother Apoſtle St. *Paul*.

The *Saxons* had the Scriptures in the vulgar Tongue,

The *Popiſh Prieſts* could not, with ſo much Confidence, charge us with a Crime, at leaſt not with Novelty in having the Scripture in our Mother Tongue; did they know that the whole *Bible* was tranſlated into *Saxon*, our Mother Tongue, above Eight hundred Years ago, by great Prelates,

and celebrated Kings of *England*, to be ſeen great Part thereof to this very Day. King *Alfred* with his own Hand tranſlated great Part of the Bible into *Saxon*, which was then the vulgar Language, and firſt divided the Scripture into Portions to be read on Feſtivals. Nay the *Saxon* Kings not only permitted ſuch Tranſlations, and encouraged them by their own pious and great Example, but made Laws for eſtabliſhing thereof, and for teaching the Scriptures in their own Language. The People were ſo far from being injoined to pray in an unknown Tongue, that ſevere Laws were laid on them, enacting, That every Man ſhould learn the *Lord*'s Prayer and the *Apoſtles Creed* in their Mother Tongue, that he might attain to the true Faith, and that thereby he might be enabled to pray according to that Faith; and ſuch as refuſed to learn them were not to be admitted to the Sacrament while living, nor to Chriſtian Burial when dead. And to that purpoſe Canons were alſo made; as in *Ælfrick* the Archbiſhop's Time, which was above Seven hundred Years ago, a Canon was made which injoins the Prieſt on *Sundays* and *Holy Days* to teach the true Senſe of the Goſpel to the People in *Engliſh*, and alſo to teach them their *Pater Noſter* and *Creed*. The *Saxon* Homilies, and other *Saxon* Writings, will farther acquaint you, that the monſtrous Doctrine of Tranſubſtantiation, deſtructive of all Science, and againſt all common Senſe, was not thought of in the Days of our *Saxon* Anceſtors.

and prayed therein,

and were ſo injoined by Canons.

They knew not Tranſubſtantiation.

Saxon Councils, *&c.* refute modern Popery,

by ſhewing its Infancy.

This Language will help the Divine to Councils, Canons and Decrees of our *Engliſh* Church, whereby he may the more eaſily refute the Calumny of the Papiſts, that we have departed from the Faith of our Anceſtors; where he may find that the Doctrine of the Church concerning our Faith and the Holy Euchariſt was the ſame antiently as it is now, and that Popery was then but in its Infancy, a new invented Thing, which about the Conqueſt roſe to its Height.

From the Ignorance of this Tongue, Men have unawares been led into Prophaneneſs, and have been tempted to ridicule a Tranſlation of the ſacred Scriptures, which tho' miſtaken, ought, in regard to the Dignity of the Original, to be

preſerved from being made the Object of Jeſt. I myſelf have heard the ſecond Verſe of the Singing Pſalms treated by ſome with great Contempt, calling it Nonſenſe and unintelligible: but the Nonſenſe proceeded only from their Ignorance. The Verſe objected to, and that before it run thus: *The Man is bleſt that hath not bent, to wicked Read his Ear*; now in the Word *Read* was the Jeſt, which for their Lives they could not underſtand; but had they conſulted the Original of their own Language, they would ſoon have found, that *Read*, otherwiſe *Rede*, as it is to be found in old Bibles, in *Saxon* Ræbe, or *Rede*, ſignified Counſel or Advice; in which meaning, I hope, it will be allowed to be very good Senſe: So Ræbeꝛ-men, or *Redes-men*, ſignifies Counſellors. As to our Hiſtorians and Antiquaries, it ſeems to be abſolutely neceſſary for them to have ſome Knowledge of this Tongue, if they would give us a compleat Account of Things before, and ſome Time after *William* the Firſt; for it ſhould ſeem difficult to write accurately of thoſe Times without it. Hiſtory and Antiquity are the Glaſs of Time; to know Nothing before we were born, is to live like Children; and to underſtand *Nothing* but what directly tends to the getting a Penny, is to live the Life of a ſordid Mechanick. And here give me Leave to take Notice of one Error, among many, committed by the Author of the *Hereditary Right of the Crown of* England; which, if he had compar'd with ſome *Saxon* Records, he could not have fallen into. Speaking of *Maud the Empreſs*, he ſays, *That when ſhe was in Poſſeſſion, ſhe never took upon her the Title of Queen, but either retained that of Empreſs, or elſe called herſelf* Domina Anglorum, *the Lady of the* Engliſh; and therefore he concludes Dr. *Higden* to be miſtaken in his Aſſertions about that Matter. But that Author is himſelf miſtaken, for *Lady of the* Engliſh, was the Title of *Queen*.

The *Saxon* Language explains old *Engliſh* Writings, &c.

The *Saxons* uſed two Words to ſignify the *Queen*, and thoſe were Cþen, *Cwen*, and þlæfdia, Cþen, *Cwen* and *Hlæfdia*, Cþen, *Cwen*, originally ſignified the Wife of any one, but afterwards *propter Excellentiam* it came to be applied to the Wife of the King only, and therefore the *Queen* was called Sæꝛ Cynnigeꝛ Cþen, the Wife of the King; when Cþen, *Cwen*, had

had obtained this Signification, it was yet expreſſed very often by ꝑlæfdıa, *Hlæfdia*, ſometimes ꝑlafdıȝ, ꝑlafdı, ꝑlaudı, from whence comes our *Engliſh* Word *Lady*. In ſeveral *Saxon* Charters you'll find it ſo expreſſed; as in two of Queen *Edith*, which are in the Church of *Wells*; Cꝑen, *Cwen*, ſignified among the *Saxons* not only a *Queen Conſort* and *Queen Dowager*, but an abſolute *Queen* upon the Throne; ſo ꝑlæfdıa, or ꝑlafdıa, ſignified the ſame. In the Will of *Brithric* the *Thane* you will find a Legacy given the Queen, and it is bequeath'd to her by the Name of Sæꝛe ꝑlæfdıan, *Dominæ*, the Lady.

For as ꝑlafoꝛd, *Hlaford*, from whence our *Engliſh* Word *Lord* comes, emphatically ſignified *King*; ſo ꝑlafdıȝ ſignified *Queen*. And from thence it was that *Maud* the Empreſs, to whom all the Nobility in the Kingdom had ſworn Allegiance, was received by the *Engliſh* as their *Queen*, according to the then Idiom of the *Engliſh* Tongue, by the Name of ꝑlafdıȝ, *Hlafdig*, *Lady*; who rightly diſtinguiſh'd her, by that Appellation from *Maud* the Wife of King *Stephen*, who is called Cınȝeꝛ Cꝑen, *Cinges Quen*, *the King's Queen*. Many more Authorities to this Purpoſe may be found, but theſe are enough to ſhew how *Lady* came to ſignify *Queen*. And this is the concurrent Opinion of all learned Men, that have conſidered this Matter. Further, Dr. *Brady* in his *Compleat Hiſtory of* England makes *Domina*, in all the Paſſages out of *Malmsbury*, in relation to *Maud* the Empreſs, to ſignify *Queen*. My Lord *Coke* is of the ſame Opinion, he calls her Queen by the Name of *Domina Anglorum*; and on this Occaſion he ſhews that ſome of our Kings choſe to call themſelves *Domini Hiberniæ*, *Lords of* Ireland, when they were as much *Kings of Ireland*, as of *England* or *France*. And it is pretty remarkable, that from the Time of King *John* to the Twenty-third Year of *Henry* VIII. none of our Kings, in all that Interval, thought fit to alter this antient Stile of *Dominus*, but were called *Domini Hiberniæ*, *Lords of Ireland*; tho' I ſuppoſe, no Body doubts but they had the Regal Power, and were Kings of *Ireland* in the ſame Senſe as of *England*.

Mr. *Selden* alſo acknowledges *Maud* the Empreſs to be *Queen*; he ſays, in his *Titles of Honour*, That as Kings with their Subjects of the greater Name, have been ever ſtiled by *Dominus*; ſo *Queens* have had, and uſed the Name of *Domina*, as Lady *Maud* called herſelf *Imperatrix Hen. Regis Filia, & Anglorum Domina.* Dr. *Hickes* is alſo of the ſame Opinion, and in his *Diſſertation on the Antiquities of the Laws of* England, ſays, That no Hiſtorian that ever he ſaw, but one, ever doubted that the *Engliſh* Nation receiv'd *Maud* the Empreſs for their *Queen*, under the Appellation of *Domina* or *Lady.*

As to the antient Names of Cities, Towns and Churches, Biſhops Sees, and great Seats in *England*, it is difficult, if not impoſſible, to give a good Account of their Original without this Language, becauſe they are almoſt all *Saxon*, and but few *French* or *Daniſh*; and therefore *Camden* has truly fetched moſt of his from the *Saxon* Originals; tho' he fails in many Places for want of a more compleat Knowledge of that Tongue.

How the *Saxons* formed the Names of Towns.

Now the *Saxons* did not, as the Ages ſince, Name the Places of their Conqueſts, after their own Names, being of ſhort Continuance, but named them according to their Nature, or with Relation to things natural, as *Adam* gave Names in *Paradiſe*: For inſtance, the Church of St. *Mary*'s, ſituate upon the Banks of the River *Thames* in *Southwark*, commonly called St. *Mary Overs*, in *Latin*, *Sancta Maria Ripenſis*, they named from the *Saxon* Word Ofep or Ofre, *Ofer* or *Ofre*, which ſignifies a *Bank*, which in the Genitive Caſe is Ofepep or Ofrep, *Oferes* or *Ofres*; ſo by turning the *f* into *v* the *Engliſh* Word is formed. So the Church of *All Saints*, ſituate on *Tower Hill*, *London*, commonly called *All-hallows Barkin*, comes from the *Saxon* Word Beorgen, *Bergen*, ſo named from the Word Beorg, *Berg*, which ſignifies a *Hill*, that is, *All-hallows upon the Hill*: So *Harrow on the Hill* takes it Name from the *Saxon* Word Þeorge or Þærge, *Hearge* or *Hærge*, which ſignifies a *Temple* or *Church.*

In this Language you may find many antient Hiſtories, Epiſtles, Laws, Gloſſaries, Deeds, Wills and Charters of all Sorts; Donations of Land, Emancipation of Slaves, Oaths of Princes and Coronation Oaths. In this you may read the Coronation Oath of King *Æthelred*, given by Archbiſhop *Dunſtan*, which is very remarkable; and by the way ſhews how antient Coronation Oaths are. And what is yet more Valuable, with the Help of this Language, the antient Original of *Parliaments* is more thoroughly to be underſtood; for whoever carefully and ſkilfully reads the *Saxon* Laws, and the Prefaces or Preambles to them, will find that the *Commons of England*, always in the *Saxon* Times, made Part of that *Auguſt Aſſembly*.

The World obliged to the Clergy for reſtoring the *Saxon* Language.

By this Time I hope, it does ſufficiently appear, from what I have ſaid, that this Language deſerves a greater Regard and Eſteem, than generally it has (from the Ignorance of it) met withal. And for the Honour of the Clergy, I can't help taking Notice, that the World is obliged to thoſe of that Order, for the reviving of this antient Language, and the *Northern* Literature; and that they at preſent are chiefly poſſeſs'd of this Knowledge, and that it is owing alſo to them, under the kind and generous Influence, and Encouragement of that noble Seat of Learning, the *Univerſity of Oxford*, that the way to the Attaining of this Language is now made eaſy. The Learned Dr. *Hickes* has wrote a Grammar of the *Saxon* and other *Northern* Tongues, and has reduced the *Saxon* to the proper Form of a Grammar, where you will find it (as other Languages) to have its Caſes, Moods, Tenſes and Declenſions. This is deſigned for young Beginners; but the Doctor has wrote a large Volume, which he calls *Theſaurus Linguarum Veterum Septentrionalium*, which contains not only compleat Grammars, but a Treatiſe alſo of the *Northern* Languages; and that which more particularly recommends this Book to the Peruſal of all Lawyers, as well as Antiquaries and Hiſtorians, is, that there is therein to be found a large and very Learned Treatiſe on the Antiquities of the Laws of *England*, wrote on Purpoſe for the Honour of our Laws, and for the Uſe of the Profeſſors thereof.

The famous Antiquary, Mr. *Somner* of *Canterbury*, has publiſh'd a very good *Saxon* Dictionary; and a *Saxon* Vocabulary was publiſh'd not many Years ago, by the ingenious Mr. *Benſon* of *Queen's College*, which furniſhes the World with a great Number of Words, which were wanting in *Somner*.

Mr. *Mareſhall* long ago publiſhed the *Saxon Goſpels*. The Learned Dr. *Gibſon*, now Biſhop of *London*, has publiſhed the *Saxon Chronicle*, a fine Peice; and Mr. *Thwaits* his *Saxon Heptateuch*. With theſe Helps, added to a few other *Saxon* Authors, as Sir *John Spelman*'s *Saxon Pſalms*, *&c.* now extant, the Difficulty of attaining this Language is nothing. It is in Practice ſo uſeful, and in Theory ſo delightful, that I am perſuaded no young Gentleman, who has Time and Leiſure, will ever repent the Labour in attaining to ſome Degree of Knowledge in it.

Theſe Things, I thought proper to take Notice of, which may ſerve at leaſt as Hints to ſuch young Gentlemen, as have more Time and Leiſure to carry theſe Thoughts farther, for the Improvement of that Noble Body of Laws, the Laws of *England*.

If this be of Uſe to my Country, I have my End and Deſire,

J. F. A.

DIPLOMA.

DIPLOMA.

Cancellarius Magiſtri et Scholares Univerſitatis Oxon. Omnibus ad quos præſentes Literæ pervenerint Salutem in D^no^ Sempiternam. Cùm eum in finem Gradus Academici à Majoribus noſtris prudenter inſtituti fuerint, ut Viri de Academiâ, de Eccleſiâ, de Principe, de Republicâ optime meriti, ſeu in gremio Noſtræ Matris educati, ſeu aliunde bonarum Artium Diſciplinis eruditi, iſtis Inſignibus à Literatorum vulgo Secernerentur; Sciatis quod Nos, eâ ſolâ quâ poſſumus viâ, Gradu Doctoris in Jure Civili libenter ſtudioſèq; conceſſo, Teſtamur Quanti facimus JOHANNEM FORTESCUE Militem è Curiâ Communium Placitorum Juſticiarium Juris-peritiſſimum,

mum, mirâ ſemper in has Muſarum Sedes benevolentiâ propendentem, nec minorem inde reportantem; Virum perantiquâ Illius JOHANNIS FORTESCUE Militis, qui, regnante Henrico Sexto, Summi Juſticiarij Officium, tantâ cum Dignitate per Viginti Annos implevit, Stirpe ortum; et, quod pluris æſtimamus, ad Magni ſui Anteceſſoris exemplum ſe feliciter ubiq; componentem, ſive cum eo in Scriptis Leges Angliæ eleganter collaudet, ſive Monarchiam juſtis limitibus concluſam Abſolutæ præponat, ſive ijs Artibus quæ optimum quemq; ornant Judicem, audiendi lenitate, explicandi Scientiâ, æqualitate decernendi mirificè excellat; Virum quem, pari cum ſit induſtria, pari exercitatione, pari Ingenio uberiori fortaſſe Doctrinâ locupletato, pari ergà Patriam Amore, ergà Principem Fide, parem etiam Honoris Gradum

dum conſecuturum non dubitamus ; Virum deniq; cui non ſatis eſſe videtur, relictam a Majoribus Gloriam, et Domeſticam Laudem tueri, niſi et hoc proprium ſuæ Familiæ Decus aſtruat, ut, dum Amplitudini, et Privilegiorum Incolumitati Suæ Curiæ prudenter conſulit, idem, pro ſingulari ſuâ moderatione, et Abſtinentiâ, Jura conceſſa Noſtræ Nobis non Invideat. Idcirco in Solenni Convocatione Doctorum Magiſtrorum Regentium, et non Regentium quarto die Menſis Maij Anno D^ni^ Milleſimo Septingenteſimo triceſimo tertio habitâ, Conſpirantibus omnium Suffragijs, Eundem Honorabilem et Egregium Virum Johannem Fortescue Militem Doctorem in Jure Civili creavimus et conſtituimus ; Eumq; Virtute præſentis Diplomatis Singulis Juribus, Privilegijs, et Honoribus Gradui iſti qua qua pertinentibus

tibus Honoris cauſa, frui et gaudere juſſimus. In cujus Rei Teſtimonium Sigillum Univerſitatis Oxon' commune, quo hâc in parte utimur, præſentibus apponi fecimus. Dat' in Domo noſtræ Convocationis Anno D^ni^ die et Menſe prædict'.

THE

TABLE

OF THE

NAMES of the CASES,

Alphabetically diſpoſed in ſuch a double Order, as that the Caſes may be found under the Names either of the *Plaintiff* or *Defendant*.

N. B. *Where* verſus *follows the firſt Name, it is that of the* Plaintiff; *where* and, *it is the Name of the* Defendant.

A.

ACHERLY *verſus* Bowater Vernon, & *al'*. *Page* 188
Almonſbury, The Inhabitants of, *verſus* Hodsfield. 301
Anonymus. 127, 230, 234, 235, 236, 240, 242, *ibid.* 243, 244, 268, 273, 329
Anthony *verſus* Williams. 336
Anthony, The Inhabitants of, *verſus* Cardenham. 309
Archer's Caſe. 196
Archer *verſus* Sweetnam. 346
Armagh, Archbiſhop of, and Whaley *verſus* The King. 213
Arnold *and* Horton. 361
Aſhmead *verſus* Ranger. 152
Aſhton *and* The Inhabitants of Silveſter. 308
Aſton *verſus* Blagrave. *Page* 206
Atkins *verſus* Berwick. 353
Atkinſon *and* Whelpdale. 337
Atkins's Caſe. 318
Attorney General *verſus* Eaſt India Company. 1
Audley, The Inhabitants of, *and* The King. 215
Auſtin *and* The King. 325
Aylesbury, The Inhabitants of, *and* The King. 309
Aylesbury *and* The Inhabitants of Riſborough. 279
Aynel *and* Sloman. 320

B.

BAckhouſe *verſus* Wells. 133
Bakwell, The Pariſh of, *and* The King. 307

The TABLE of the *Names of the Caſes.*

Bagot *verſus* Oughton. *Page* 332
Ballantine *verſus* Irwin 368
Ball *verſus* Squarry. 354
Banks *and* The King. 374
Bareton *verſus* Stephenſon, 343
Barwell *and* The Inhabitants of Bodington. 302
Baxter *verſus* Douglas. 334
Bayley *and* Gery. *ibid.*
Bernard, Lord, *verſus* —— 336
Bevan *and* Croſs. *ibid.*
Beaumont *and* Darbiſon, on the Demiſe of Long. 18
Belgardine *verſus* Preſton. 365
Bentley's Caſe. 202
Bentley *verſus* Epiſ. Elien'. 298
Berwick *and* Atkins. 353
Berry *and* Faulk. 343
Bigg *and* Hayn. 331
Biſham, The Inhabitants of, *ver.* Cookham. 304
Blackmore *and* Serle. 256
Blackwell *and* Dawſon. 238
Blackwater and St. Giles *and* The Inhabitants of Everſley. 320
Blagrave *and* Aſton. 206
Blyth *and* Reeves. 343
Blyth *and* Everett. 344
Bodington, The Inhabitants of, *verſus* Barwell. 302
Bolton *verſus* Jeffs. 349
Bolton *verſus* King. *ibid.*
Bond *and* Mills. 363
Boot *and* Thickbroom. 343
Borough-Fenn, The Inhabitants of. 326
Boſton *and* The Inhabitants of Horncaſtle. 301
Brandling *and* The Queen. 254
Bretford *and* The Inhabitants of Wiſhford. 311
Brockhurſt *and* Cook. 369
Bromwich *and* Kendall. 371
Brown *verſus* Sir William Morgan. 341
Browning *and* Hyde. 271
Buſh *and* Harrington. 255

C.

CAlcraft *and* Rycraft. 344
Cambridge, The Chancellor of, *and* The King. *Page* 202
Capel, The Inhabitants of, *verſus* Weſt-Peckham. 327
Capon *and* Kemp. 340
Cardenham *and* The Inhabitants of Anthony. 309
Carliſle, Mayor of, *and* The King. 200
Carmarthen, Marquis of, *and* The King. 359
Carter *verſus* Whittle. 316
Carvil *verſus* Manly. 379
Chace *verſus* Chace. 359
Chambers *and* Read. 342
Chander *and* Newman. 336
Cheeſman *verſus* Ramby. 297
Cheſterfield *and* The Inhabitants of Walton. 214
Chriſtmas *and* Peedle. 365
Clancey's Caſe. 208
Clark *and* Reynolds. 212
Clever *and* White. 333
Cockernutt *and* Screen. 347
Cockup *and* Hicks. 278
Collington *and* Haggard. 336
Cook *and* Biſhop of Wincheſter. 337
Cook *verſus* Wingfield. 347
Cook *verſus* Brockhurſt. 369
Cook *and* Ibbotſham. 372
Cookham *and* The Inhabitants of Biſham. 304
Cooper *verſus* Young. 360
Idem *verſus* Eundem. *ibid.*
Cooper *and* May. 376
Cornwallis, Lord, *verſus* Hoyle. 373
Corſham, The Inhabitants of, *and* The King. 315
Courtney *verſus* Satchwell. 380
Coxwell, The Inhabitants of, *verſus* Shillingford. 313
Creed *verſus* Mallet. 231
Creed *verſus* Lappan. 359
Crosby *and* Smith. 230
Croſs *verſus* Bevan. 334
Cumner, The Inhabitants of, *and* The King. 322

D.

DArbiſon, on the Demiſe of Long, *verſus* Beaumont and others. 18

The TABLE of the *Names of the Caſes.*

Darby *verſus* Hamond. *Page* 371
Daſhwood *verſus* Fowkes. 342
Davenport *verſus* Parker. 368
Davis *and* Mannington. 224
Dawſon *verſus* Blackwell. 238
Dean and Chapter of Weſtminſter *and* Herbert. 345
Derby *verſus* Roſe. 370
Derby *and* The Queen. 140
Dillon *and* Makepiece. 363
Douglas *and* Baxter. 334
Doulting, The Inhabitants of, *verſus* Stoke-Lane. 219
Downei *verſus* Keach. 245
Dublin, Dean of, *verſus* Archbiſhop of Dublin. 329
Duberry *and* Waring. 360
Du Caſtro's Caſe. 195

E.

EALES *and* Weſtlen. 333
Earberry *and* The King. 37
Eaſt Clendon *and* The Inhabitants of Weſt-Hertley. 216
Eaſt India Company *and* The Attorney General. 1
Ede *verſus* Jackſon. 345
Edmonton *verſus* Franklyn. 231
Elien. Epiſ. *and* Bentley. 298
Everett *verſus* Blyth. 344
Everſley, Inhabitants of, *verſus* Blackwater and St. Giles's. 320
Exon, Biſhop of, *and* Selleck. 352
Idem *verſus* Eundem. *ibid.*

F.

FArringdon *and* The Inhabitants of St. Paul. 313
Faulk *verſus* Berry. 343
Fellows *and* The Queen. 166
Feverſham, Inhabitants of, *and* The King. 221
Fiſher's Caſe. 335
Fludd *and* Roe. 184
Forſter *verſus* Pollington. 186
Forty *verſus* Owbear. 346
Fowkes *and* Daſhwood. 342
Fowler *and* The King. *Page* 243
Fox *and* Verney. 337
France and others *and* Duke of Somerſet. 41
Francis *and* Williams. 354
Franklin *and* Edmonton. 231
Freeport, The Inhabitants of. 303
Frencham *and* Inhabitants of Pepper-Harrow. 322
Fromanteel *verſus* Williams. 367

G.

GATON, The Inhabitants of, *verſus* Milwich. 239
George *verſus* Powell. 221
Gery *verſus* Bayley. 334
Gibbs *and* Rogers. 376
Gibſon *and* The King. 272
Gibſon *and* Horſeman. 32
Gilmore *and* Plunkett. 211
Glover *verſus* Heathcot. 337
Goodwyn *and* Turner. 145
Gooſtrey *and* Jenyngs. 366
Goſlin *verſus* Williams. 378
Grandborough *and* The Inhabitants of Mereſley. 302
Green *and* The Queen. 274
Gregſon *verſus* Heather. 366
Grimes *verſus* Hornblower. 362
Gun *and* Williams. 177

H.

HAggard *verſus* Collington. 336
Halberton *and* The Inhabitants of Kentis-Beer. 308
Hall *and* Wright. 182
Hall *verſus* Tullie. 336
Hall *and* Vaus. 369
Hamond *and* Darby. 371
Hancy *and* The Inhabitants of Stallemberg. 323
Hange *verſus* Manning. 364
Hanway, The Inhabitants of, *verſus* Mauton. 217
Hargill *and* Hunt. 347
Hargrave *verſus* Taylor. 375

Har-

The TABLE of the *Names of the Caſes.*

Harrington *verſus* Buſh. *Page* 255
Harrow and Edgware, The Inhabitants of, *and* The King. 310
Harris *and* Watkins. 367
Hawkins *and* Turner. 351
Hawkins *and* The King. 272
Hayton *and* Lock. 246
Hay *and* Inces. 353
Hayn *verſus* Bigg. 331
Heathcot, Sir Gilbert, *and* The Queen. 283
Heathcot *and* Glover. 337
Heathfield *and* Mayfield. 306
Heather *and* Gregſon. 366
Helmer *and* Luke. 377
Herbert *verſus* Dean and Chapter of Weſtminſter. 345
Hern *verſus* ———. 335
Hetherington *verſus* Reynolds. 269
Hicks *verſus* Cockup. 278
Hide *verſus* Browning. 271
Hill *verſus* Tullie. 336
Hodsfield *and* The Inhabitants of Almonſbury. 301
Holliday *verſus* Pitt. 342
Hopwood *and* Talbot. 335
Hornblower *verſus* Grimes. 362
Horncaſtle, The Inhabitants of, *verſus* Boſton. 301
Horn *verſus* Lewins. 233
Horſeman *verſus* Gibſon. 32
Horton *verſus* Arnold. 361
Hornſey, The Inhabitants of. 199
Hughes *and* Owen. *ibid.*
Houghton, Sir H. *verſus* Starkey. 348
Hoyle *and* Lord Cornwallis. 373
Hunt *verſus* Hargill. 347
Hyder *verſus* Warren. 333

I.

JAckſon *and* Ede. 345
James *verſus* Parſons. 374
Jameſon *and* Lutwydge. 210
Ibbotſham *verſus* Cook. 372
Jeffs *and* Bolton. 349
Jenyns *verſus* Gooſtrey. 366
Ilay, Lord, *and* Prior. 338
Inces *verſus* Hay. 353
John *and* Kendal. 104
Joſceline *verſus* Laſſere. *Page* 281
Joyford, Inhabitants of, *verſus* Solebury. 317
Irwin *and* Ballantine. 368
Iſlip, The Inhabitants of, *and* The King. 305

K.

THE King. *See* Rex.
Keach *and* Downci. 245
Keble *and* Sparks. 378
Kemp *verſus* Capon. 340
Kendal *verſus* John. 104
Kendall *verſus* Bromwich. 371
Kenrick and Price. 338
Kentis-Beer *verſus* Halberton. 308
King's Langley, Inhabitants of. 323
Knott *and* Obin. 339

L.

LAmbeth, The Inhabitants of. 318
Lance *verſus* Theedam. 341
Lane *and* The Queen. 275
Lappan *and* Creed. 359
Lapel *and* Pack. 344
Laſſere *and* Joſceline. 281
Laughton *and* Walker. 277
Layer *and* The King. 396
Leach *verſus* Page. 270
Leeds, Duke of. 359
Leiceſter *and* The Inhabitants of Warminſter. 326
Leighton *and* The Queen. 173
Levat *verſus* Reſhere. 337
Lewins *and* Horn. 233
Lock *verſus* Hayton. 246
London *and* The Queen. 317
Lowther, Robert, Eſq; *verſus* Michael Raw and others. 44
Luke *verſus* Helmer. 377
Luton *and* The Inhabitants of Sanderidge. 314
Lutwydge *verſus* Jameſon. 210

M.

MAnwaring *and* Vaux. 197
Makepiece *verſus* Dillon. 363

Mallet *and* Creed. *Page* 231
Manly *and* Carvill. 379
Manners *and* Pern. 155
Manning *and* Hange. 364
Mansfield *verſus* Richman. 330
Marſhall *and* Read. 377
Marſh *and* Watkins. 364
Martin *and* White. 375
Martin *and* Newton. 280
Matthews *and* Spicer. 375
Mauton *and* The Inhabitants of Hanway. 217
Mayfield *verſus* Heathfield. 306
Mayhew *verſus* Mayhew. 367
Mayor and Aldermen of Carliſle *and* The King. 200
May *verſus* Cooper. 376
Mereſly, The Inhabitants of, *verſus* Grandborough. 302
Middleton, Doctor, *and* The King. 201
Mills *verſus* Bond. 363
Mills *and* Neat. 371
Milwich *and* The Inhabitants of Gaton. 239
Mitchell *verſus* Reynold. 296
Monks Riſborough, Princes Riſborough, The Inhabitants of, *verſus* Ayleſbury. 279
Monnington *verſus* Davis. 224
Mordington, Lord, his Caſe. 165
Morehead *and* Peters. 339
Morgan, Sir William, *and* Brown. 341
Morton (Mary Hill) *and* The King. 271
Morris *and* Smith. 340
Mulcaſter *and* Whitney. 354
Mulſo *verſus* Shere. 330
Munday *and* The King. 303

N.

NEAL *and* Stratford. 350
Neat *verſus* Mills. 371
New-Elm, The Inhabitants of, *verſus* Oxon. 309
Newington-Butts *and* The King. 315
Newman *verſus* Chander. 336
Newman *and* Nicols. 361
Newton *verſus* Martin. 280
New-Windſor *and* The Inhabitants of White Waltham. 304
Nicols *and* The Queen. *Page* 271
Nicols *verſus* Newman. 361
Nicholſon *verſus* Simpſon. 356
Nokes *verſus* Watts. 319
Northey, Sir Edward, *and* The Eaſt India Company. 1
Norton *and* The Queen. 232
Norwich, Dean and Chapter of, *and* Dr. Sherlock. 222
Nott *verſus* Stephens. 367
Nutt *verſus* Stedman. 372

O.

OATS *verſus* Robinſon. 373
Obin *verſus* Knott. 339
Ogden *and* The King. 251
Onon *and* Rudge. 376
Onſlow *verſus* —— 341
Orton *and* Raines. 379
Overton, Inhabitants of, *verſus* Stephenton. 316
Oughton *and* Bagot. 332
Owbear *and* Forty. 346
Owen *verſus* Hughes. 199
Owen & al' *verſus* Reynolds. 341
Oxon *and* The Inhabitants of New-Elm. 309

P.

PACK *verſus* Lapel. 344
Page *and* Leach. 270
Pain *and* The King. 357
Palgrave *and* Windham. 372
Panington, The Inhabitants of, *and* The King. 323
Parker *and* Davenport. 368
Parſons *and* James. 374
Peedle *verſus* Chriſtmas. 365
Penn *and* Wright. 381
Pepper Harrow, Inhabitants of, *verſus* Frencham. 322
Pern *verſus* Manners. 155
Peters *verſus* Morehead. 339
Pickering *verſus* Symonds. 334
Pitt's Caſe. 159
Pitt *and* Holliday. 342
Plunket *verſus* Gilmore. 211
Pollington & Ux' *and* Forſter. 186

Portſmouth, The Inhabitants of, *and* The King. *Page* 328
Powell *and* George. 221
Preſton *and* Belgardine. 365
Price *verſus* Kenrick. 338
Prior *verſus* Lord Ilay. *ibid.*
Puckington, The Inhabitants of, *and* The King. 321

Q.

QUEEN *verſus* &c. *See* Regina.

R.

RAgby, The Inhabitants of, *and* The King. 250
Rains *verſus* Orton. 379
Ramby *and* Cheeſman. 297
Ranger *and* Aſhmead. 152
Ratcliffe, The Inhabitants of, *and* The King. 306
Raw and others *and* Lowther. 44
Read *and* The Queen. 98
Read *verſus* Marſhall. 377
Read *verſus* Chambers. 342
Reed *and* The King. 306
Reeves *verſus* Blyth. 343
Regina *verſus*
- Brandling. 254
- Derby. 140
- Fellows, Doctor of Phyſick. 166
- Sir Gilbert Heathcot. 283
- Green. 274
- Inhabitants of Stratton. 253
- Inhabitants of Hornſey. 254
- Lane. 275
- Leighton. 173
- London. 317
- Nicholls. 271
- Norton. 232
- Read. 98
- Wyat. 127

Reſhere *and* Levat. 337
Rex *verſus*
- Armagh, Archbiſhop of. 213
- Audley, Inhabitants of. 215
- Auſtin. 325
- Ayleſbury, Inhabitants of. 309
- Bakewell Pariſh. 307
- Banks. 374
- Cambridge, Chancellor of. *Page* 202
- Carliſle, Mayor and Aldermen of. 200
- Carmarthen, Marquis of. 359
- Corſham, Inhabitants of. 315
- Cumner, Inhabitants of. 322
- Earberry. 37
- Feverſham and Graveny, Inhabitants of. 221
- Fowler. 243
- St. George's, Inhabitants of. 315, 320, 327
- Gibſon. 272
- Harrow on the Hill, Inhabitants of. 310
- Hawkins. 272
- Hill Morton. 271
- St. John Baptiſt, Inhabitants of. 321
- St. John Clerkenwell. 324
- Iſlip. 305
- Layer. 396
- St. Leonard Shoreditch, Inhabitants of. 324
- Marquis of Carmarthen. 359
- St. Mary Colechurch. 306
- Middleton, Doctor. 201
- Munday. 303
- Newington Butts. 315
- Ogden. 251
- Pain. 357
- St. Peters. 318
- Portſmouth, Inhabitants of. 328
- Puckington, Inhabitants of. 321
- Ragby, Inhabitants of. 250
- Ratcliff, Inhabitants of. 306
- Reed. *ibid.*
- Ridpath. 358
- Riſborough, Inhabitants of. 314
- Rocheſter, Biſhop of & al'. 101
- Rufford, Inhabitants of. 321
- Saxmundham. 307
- Tucker. 362
- Venables. 325
- Urling. 198
- Wiccombe, Inhabitants of. 318
- Wiſeman. 91
- Woodend, Inhabitants of. 328

Reynolds *and* Owen & al'. 341

The TABLE of the *Names of the Caſes.*

Reynolds *and* Hetherington. *Page* 269
Reynolds *and* Taylor. 244
Reynolds *verſus* Clark. 212
Reynolds *and* Stoughton. 168
Reynold *and* Mitchell. 296
Richman *and* Mansfield. 330
Richam *and* Wheely. 342
Ridge *and* Wood. 376
Ridpath *and* The King. 358
Riſlip, Hendon *and* Harrow Pariſhes. 311
Riſborough *and* The King. 314
Roberts *and* Thompſon. 339
Robinſon *verſus* Taylor. 366
Robinſon *and* Oats. 373
Rocheſter, Biſhop of, Kelly and Cockran *and* The King. 101
Roe *verſus* Fludd. 184
Rogers *verſus* Gibbs. 376
Roſe *and* Derby. 370
Rudge *verſus* Onon. 376
Rudgwick, Chiddingfold and Dunsfold, The Inhabitants of. 310
Ruſh *verſus* Ruſh. 370
Rycraft *verſus* Calcraft. 344

S.

ST. Andrew's Holborn *and* Spittlefields. 307
St. John the Baptiſt, The Inhabitants of, *and* The King. 321
St. Katherine's, The Inhabitants of, *ver.* St. George's. 218
St. John, Clerkenwell, Inhabitants of, *and* The King. 324
St. Lawrence in Reading, The Inhabitants of. 310
St. George's *and* The Inhabitants of St. Katherine's. 218
St. George's, The Inhabitants of, *and* The King. 315, 320, 327
St. Paul's, Inhabitants of, *verſus* Farrington. 313
St. Giles's *verſus* Weybridge. 315
St. Giles's *and* The Inhabitants of Eversley. 320
St. Peter's *and* The King. 318
St. Leonard's Shoreditch, The Inhabitants of, *and* The King. 324
Sandridge, The Inhabitants of, *verſus* Luton. *Page* 314
Satchwell *and* Courtnay. 380
Savile *verſus* Savile. 351
Saxmundham *and* The King. 307
Scawell *and* Hern. 335
Screen *verſus* Cockernutt. 347
Seaton *and* Thwaits. 231
Selleck *verſus* Biſhop of Exon. 352
Serle *verſus* Blackmore. 256
Shaw *verſus* Weigh & al'. 58
Shere *and* Mulſo. 330
Sherlock, Doctor, *verſus* Dean and Chapter of Norwich. 222
Shillingford *and* The Inhabitants of Coxwell. 313
Silveſter, Inhabitants of, *verſus* Aſhton. 308
Simonds *and* Pickering. 334
Simpſon *and* Nicholſon. 356
Sloman *verſus* Aynel. 320
Smith *verſus* Crosby. 230
Smith *verſus* Morris. 340
Sneedon *and* The Inhabitants of Southwell. 313
Solden *and* Woolverton. 314
Solebary *and* Joyford. 317
Somerſet, Duke of, *verſus* France and others. 41
Southwell, The Inhabitants of, *verſus* Sneedon. 313
Sparks *verſus* Keble. 378
Spicer *verſus* Matthews. 375
Spittlefields, Inhabitants of, *verſus* St. Andrew's Holborn. 307
Squarry *and* Ball. 354
Stallemberg *verſus* Haney. 323
Starkey *and* Sir H. Houghton. 348
Stedman *and* Nutt. 372
Stephens *verſus* Nott. 367
Stephenſon *and* Bareton. 343
Stephenton *and* The Inhabitants of Overton. 316
Stoke-Lane *and* The Inhabitants of Doulting. 219
Stoughton *verſus* Reynolds. 168
Stratford *verſus* Neal. 350
Stratton, The Inhabitants of, *and* The Queen. 253
Sweetnam *and* Archer. 346

T.

T.

TAlbot *verſus* Hopwood. *Page* 335
Taunton Borough 325
Taylor *verſus* Woollen. 380
Taylor *and* Hargrave. 375
Taylor *and* Robinſon. 366
Taylor *verſus* Reynolds. 244
Theedam *and* Lance. 341
Theerſly *and* The Inhabitants of Whitley. 312
Thickbroom *verſus* Boot. 343
Thompſon *verſus* Roberts. 339
Thwaits *and* Seaton. 231
Tucker *and* The King. 362
Tullie *and* Hall. 336
Turner *verſus* Hawkins. 351
Turnor *verſus* Goodwyn. 145

V.

VAUS *verſus* Hall. 369
Vaux *verſus* Mainwaring. 197
Venables *and* The King. 325
Verney *and* Fox. 337
Vernon, Bowater, *and* Acherly. 188
Urling *and* The King. 198

W.

WAlker *verſus* Laughton. 277
Walton, The Inhabitants of, *verſus* Cheſterfield. 214
Warminſter, Inhabitants of, *verſus* Leiceſter. 326
Warren *and* Hyder. 333
Waring *verſus* Duberry. 360
Watkins *verſus* Harris. 367
Watkins *verſus* Marſh. 364
Watts *and* Nokes. 319
Weigh & al' *and* Shaw. 58
Wells *and* Backhouſe. 133
Weſtlen *verſus* Eales. *Page* 333
Weſtminſter, Dean and Chapter of, *and* Herbert. 345
Weſtwood-Hay, Inhabitants of. 303
Weſt-Peckam *and* The Inhabitants of Capel. 327
Weſt-Hertley, The Inhabitants of, *ver.* Eaſt-Clendon. 216
Weybridge *and* St. Giles's. 315
Whelpdale *verſus* Atkinſon. 337
Wheeley *verſus* Richam. 342
White *verſus* Martin. 375
White *verſus* Clever. 333
White-Waltham, The Inhabitants of, *verſus* New-Windſor. 304
Whittle *and* Carter. 316
Whitley, The Inhabitants of, *verſus* Theerſley. 312
Whitney *verſus* Mulcaſter. 354
Williams *verſus* Gun. 177
Williams *verſus* Francis. 354
Williams *and* Fromanteel. 367
Williams *and* Goſlin. 378
Williams *and* Anthony. 336
Wincheſter, Biſhop of, *verſus* Cook. 337
Windham *verſus* Palgrave. 372
Wingfield *and* Cook. 347
Wiſeman *and* The King. 91
Wiſhford, Inhabitants of, *verſus* Bretford. 311
Wolverton, The Inhabitants of, *verſus* Solden. 314
Woodend, The Inhabitants of, *and* The King. 328
Wood *verſus* Ridge. 376
Woollen *and* Taylor. 380
Wright *verſus* Penn. 381
Wright *verſus* Hall. 182
Wyat *and* The Queen. 127
Wyat *verſus* —— 377

Y.

YOung *and* Cooper. 360

DE

Term. Sanct. Hill.

10 *Annæ Reginæ.*

In the EXCHEQUER.

Sir Edward Northey, Knight, her Majeſty's Attorney General, on Behalf of her Majeſty, Plaintiff;

AND

The united Company of Merchants of England, trading to the Eaſt-Indies, Defendants.

The Information.

What is the true Method of computing the Duties on unrated *Eaſt-India* Goods upon *Stat.* 2 *Ann.* and ſeveral other Statutes; and what Allowance are to be made.

THE Information ſets forth, that by the Laws and Statutes of this Realm, there are ſeveral Cuſtoms, Impoſitions, and other Duties payable to her Majeſty, her Heirs and Succeſſors, at the Cuſtom Houſe, upon Goods, Wares and Merchandizes imported from *Perſia*, *China*, or the *Eaſt-Indies*: In all thoſe Duties there is a Diſtinction between the groſs Duties and neat Duties. The groſs Duty is the Sum *per Cent.* given or granted by the ſeveral Acts of Parliament, which direct ſmall Allowances to be made thereout to the Merchants for prompt Payment; and thoſe Allowances being deducted, the Remainder is the neat Duty payable to the Crown: All which Duties are to be collected and levied in ſuch Method, and with ſuch Abatements and Allow-

ances as are thereby preſcribed, *viz.* where any of ſuch Commodities are particularly rated in the Book of Rates, there the ſaid Duties are to be collected and levied according to ſuch Rates. But where any of the ſaid Commodities are not mentioned or ſet down in the ſaid Book of Rates, nor any Value put upon them, there the Value of ſuch Goods according to which the Duties are to be paid, (except Coffee) are to be reckoned according to the groſs Price at which ſuch Goods ſhall be ſold openly and fairly, by Way of Auction, or by Inch of Candle; making ſuch Allowances only out of the ſame, as are provided by an Act made 2 *Annæ Reginæ*, intitled, *An Act for granting to her Majeſty an additional Subſidy of Tonnage and Poundage for three Years, and for laying a Duty on* French *Wines, and for aſcertaining the Value of unrated Goods, imported from the* Eaſt-Indies, (which Act, by another Act 4 *Annæ*, is continued for ninety-eight Years.) By which Act it is enacted, That out of the Value of the ſaid Goods ſo to be aſcertained by the Price at the Candle, there ſhould be a Deduction and Allowance made of ſo much as the neat Duties, payable to her Majeſty for the ſame Goods reſpectively, do amount unto (except the Duty of 5 *l. per Cent.* payable to the Queen for the Uſe of the Company) and of ſo much as the Company, *bona fide*, ſhall allow for prompt Payment to the Perſons, who, at ſuch Sales ſhall buy the ſaid Goods at Times, (which is uſually reckoned at 6 *l.* 10 *s. per Cent.* upon the groſs Price) and alſo upon the whole Values of the ſaid Goods ſo to be aſcertained, by the Price at the Candle, there ſhall be deducted and allowed 6 *l.* for every 100 *l.* for the Company's Charges in keeping ſuch Goods, from the Time of Importation till the Sale by the Candle; and in that Proportion for a greater or leſſer Value. By which ſaid Clauſe, the Values of ſuch unrated Goods, according to which the Duties are to be collected, muſt be ſuch Values as remain after the three Deductions and Allowances before-mentioned are made out of the groſs Price or Value at which the Goods are ſold by the Candle; and when thoſe Allowances are deducted out of the groſs Price, the Duties are to be collected and paid for the remaining Sum.

The Allowance of the neat Duties is appointed to be only of ſuch neat Duties as are payable to the Crown, that is, what the Crown actually receives for the ſame Goods reſpectively; which, for an Example, in the Caſe of *China* Ware, are computed at 29 *l.* 19 *s.* 7 *d.* ½, in every 100 *l.* groſs Value. Therefore deducting the 29 *l.* 19 *s.* 7 *d.* ½, together with 6 *l.* 10 *s.* for prompt Payment to the Buyer at the Time, and 6 *l.* for Charges in keeping the Goods till Sale, making in all 42 *l.* 9 *s.* 7 *d.* ½ out of each 100 *l.* groſs Value of *China* Wares ſold, the remaining Sum, according to which the Duties are to be reckoned and collected, will be 57 *l.* 10 *s.* 4 *d.* ½, and no leſs; and according to that Proportion, the Crown is intitled to receive for Duties, in every 100 *l.* groſs Value of *China* Wares ſo ſold, the ſaid Sum of 29 *l.* 19 *s.* 7 *d.* ½; and ſo *pro rata* for a greater or leſſer Value, as appears by the Specimen N° 2. as was annexed to the Information.

By other Acts of Parliament, there is a Duty of 15 *l.* *per Cent.* laid upon Muſlins and Callicoes, over and above all other Duties; which Duty is to be reckoned according to the groſs Price at which ſuch Goods are ſold: And if the ſame be paid to the Crown within twenty Days after the Sale (ſuch Sale being made within twelve Months after the Importation thereof) there is a Diſcount of 5 *l.* *per Cent.* allowed, which reduces the ſaid 15 *l.* to 14 *l.* 5 *s.* *per Cent.* and therefore to aſcertain the other Duties chargeable upon that Commodity, there muſt be a Reduction of the ſaid 15 *l.* to 14 *l.* 5 *s.* *per Cent.* out of every 100 *l.* groſs price, as well as of the ſaid other three Allowances of 6 *l.* 10 *s.* and 6 *l.* and of the other neat Duties, actually paid to the Crown, computed at 19 *l.* 0 *s.* 11 *d.* which ſaid four Allowances making together 45 *l.* 15 *s.* 11 *d.* being deducted out of each 100 *l.* groſs Price, the remaining Sum, according to which the ſaid other Duties are to be collected for Callicoes and Muſlins will be 54 *l.* 4 *s.* 1 *d.* and no leſs.

And the Information further ſets forth, that between the 8th of *March* 1703, the Time the ſaid Act of Parliament commenced, and the 12th of *February* 1711, the Defendants

dants had imported into this Kingdom great Quantities of unrated Goods from the *Eaſt-Indies*, and other Parts, liable to pay the ſeveral Duties charged upon the ſame, which they had long ſince ſold, and refuſed to pay the Crown the Duties for the ſame, according to the Computations in the Specimens N° 2 and 4, which the Attorney General annexed to the Information, and prayed that they might be taken as Part thereof; and that the Defendants took Advantage of the Practice formerly uſed by the Officers of the Cuſtoms, who in computing the ſaid Duties, had deducted more out of the groſs Price for the neat Duties than what ought to be deducted; by Means whereof, the Crown received leſs for the ſaid Duties than what ought to have been paid; and that the Defendants inſiſted, that no more ought to be paid to the Crown, for ſuch unrated Goods than what ariſes from the groſs Price thereof, upon Sale by the Candle, after a Deduction made not only of the neat Duties payable to the Crown for the ſame Goods, but of the Duties for the groſs Price at the Candle, amounting to 52 *l.* 2 *s.* 6 *d.* which was deducting Duties upon ſuch Duties, and alſo upon the ſaid Allowances of 6 *l.* 10 *s.* and 6 *l.* making in all 64 *l.* 12 *s.* 6 *d.* which being deducted out of 100 *l.* the groſs Price of China Ware, reduces the ſame to 35 *l.* 7 *s.* 6 *d.* and the Duties then ariſing from ſuch reduced Value, amounted to no more than 18 *l.* 8 *s.* 9 *d.* ½. by which Method of Computation, the Duties for every 100 *l.* groſs Value of China Ware, would be leſs by 11 *l.* 10 *s.* 10 *d.* than what ought really to be paid according to the true Method of Computation, as appeared by the Specimen N° 2. compared with the Defendants Specimen N° 3. which was alſo annexed to the ſaid Information.

And the Attorney General further ſet forth, That in the Inſtances of Callicoes and Muſlins, the Defendants inſiſted on the like Deduction of Duties upon Duties, and alſo of Duties upon the ſaid Allowances of 6 *l.* 10 *s.* and 6 *l.* thereby reducing the 100 *l.* groſs Price at the Candle to 38 *l.* 2 *s.* 3 *d.* and that the Duties ariſing from that reduced Value amounted to no more than 13 *l.* 7 *s.* 10 *d.* by which Means the Duties payable to the Crown for every 100 *l.* groſs Value

of Callicoes and Muſlins would be leſs by 5 *l.* 13 *s.* 1 *d.* than what ought to be paid, as appeared by the Specimen N° 4. compared with the Defendants Specimen N° 5. which was alſo annexed to the Information; and that likewiſe in all other Caſes of unrated Goods imported from the *Eaſt-Indies*, the Defendants inſiſted upon the like Manner of deducting the Duties, and reducing the groſs Price, ſo as the Crown loſt a conſiderable Proportion of the Duties which ought to be received.

Poſt page 16, 17.

And farther ſetting forth, that the Commiſſioners and Officers of the Cuſtoms had required the Defendants to pay to the Crown the Duties of ſuch unrated Goods imported by the Defendants within Time aforeſaid, as the ſame had been computed in the Method before ſet forth; *viz.* reckoning the Duties of 29 *l.* 19 *s.* 7 *d.* ½ to be due for every 100 *l.* groſs Value of *China* Ware, and 19 *l.* 0 *s.* 11 *d.* to be due for every 100 *l.* groſs Value of Callicoes and Muſlins, beyond the 15 *l.* or 14 *l.* 5 *s.* *per Cent.* as it ſhould happen, and ſo *pro rata* for a greater or leſſer Value, and alſo reckoning the Duties of the other unrated Goods according to their reſpective Proportions; but that the now Defendants had refuſed to account with the Crown for the Duties of *China* Ware, Callicoes and Muſlins, or any other unrated Goods, upon the foot of the ſaid Computation, or to pay the Moneys due or payable for the ſame; by reaſon whereof ſeveral great ſums of Money, exceeding in the whole 20,000 *l.* were ſtill due and unſatisfy'd to the Crown, from the Defendants, for the Duties of ſuch unrated Goods.

Wherefore it was prayed by the Information, that the Defendants might account with her Majeſty for the Duties of the ſaid unrated Goods, according to the Specimens N° 2 and 4, and that the Method thereby propoſed, of collecting the Duties upon unrated Goods, by making a Deduction out of the groſs Price of ſuch Sum only, for neat Duties as the Crown actually received for the ſame Goods reſpectively, might be eſtabliſhed by the Decree of the Court.

The Prayer of the Information.

Poſt page 14, 16.

The Anſwer. To which Information the Defendants put in their Anſwer, and thereby inſiſted, That the Duties of the unrated Goods had been always paid by them, according to the Specimens N° 3 and 5, which they apprehend to be according to the obvious Meaning of the ſaid Act 2 *Annæ Reginæ*, and to the antient and known Practice of the Cuſtom-Houſe, in collecting the Duties; and according to which, all Merchants in *England* had paid Cuſtoms upon unrated Goods, and that the Method of Computation inſiſted on by the Attorney General, would be attended with great Difficulties and Delays.

Poſt page 15, 17.

And farther, that ſeveral Goods had been ſold by them at the publick Sales by the Candle, Part whereof did not belong to the Defendants, but were for the Account of private Perſons who had Liberty to trade to the *Eaſt-Indies*, and of whom they received no more for their Cuſtoms than what the ſame amounted to by the old Method of Computation, which was publickly known and allowed, by the Officers of the Cuſtoms; and that the Sum which was univerſally taken and underſtood at the Time of Sale to be the Duties for thoſe Goods, was the Rule for the Drawback upon the Exportation thereof; and that if the Duties had then been known to be higher, the Drawback muſt have been ſo likewiſe, and that would in ſome Meaſure have raiſed the Price (though not equal to the Advance of the Duties) as well of the Goods for domeſtick Conſumption, as of thoſe for Exportation; ſo that it would be a manifeſt Loſs to the Defendants, if by a new Conſtruction they ſhould be made liable to a higher Duty, and hoped they ſhould not be obliged to the intricate Way of Computation propoſed in the Information, but that they might account for the Duties according to the antient Method.

And the ſaid Defendants farther inſiſted, that where Callicoes and Muſlins had been expoſed to Sale openly, by Auction, or by Inch of Candle, within twelve Months after the Importation thereof, and the ſaid Goods for Want of a Market could

not be ſold within that Time, and had been ſold afterwards, that in ſuch Caſe, upon Payment of the Duty of 15 *l. per Cent.* on ſuch Goods within twenty Days after the Time of Sale, the Defendants were intitled to the Allowance of 5 *l. per Cent.* in the Act mentioned, altho' ſuch Sale happened to be after the Expiration of the ſaid twelve Months.

The Attorney General having replied, and the Cauſe being at Iſſue, divers Witneſſes were examined, as well for the Queen, as for the Defendants; and the Cauſe came on to be heard *February* 10th 1714. when the Court took Time to give their Opinions therein; and the Cauſe coming again to be heard on the 25th of the ſame *February*, the Court unanimouſly declared, that the Deduction or Allowance which was to be made to the Defendants, for Duties payable to her Majeſty out of the groſs Price, at the Candle, of unrated *Eaſt-India* Goods, ſhould be the very ſame and no other than that which the Defendants ſhould pay to her Majeſty for the ſame Goods reſpectively; and that the Methods inſiſted upon by the Defendants, for aſcertaining the Values and computing the Duties of the ſaid unrated *Eaſt-India* Goods, and, as the Defendants in their Anſwer had ſet forth, had been to that Time uſed by the Officers of the Cuſtoms, were not according to the Direction of the ſaid Act of Parliament of the ſecond Year of her late Majeſty's Reign, but erroneous, and liable to great Abſurdities; and that the Methods inſiſted upon by the Attorney General in his Information, for aſcertaining the Values and computing the Duties of the ſaid unrated Goods, and contained in the Specimens N° 2 and 4, were the right and true Methods for aſcertaining the Values and computing the Duties of the ſaid unrated Goods, purſuant to the Direction, Intent and Meaning of the ſaid Act of Parliament; which ſaid two Specimens the Court did ratify and confirm, and decree to be obſerved and practiſed by the Officers of the Cuſtoms, as the true and right Methods for aſcertaining the Values, and computing the Duties of unrated *Eaſt-India* Goods, agreeable to the Directions of the ſaid Act of Parliament.

The Declaration,

Poſt page 14, 16.

and Decree of the Court in Favour of the Crown.

And

And the Court farther declared, that the Allowance of 5 *l. per Cent.* made to the Defendants, ought not to be made out of the ſaid Duty of 15 *l. per Cent.* charged upon Muſlins and Callicoes, but where the Sale thereof ſhould be made within twelve Months after the Importation of thoſe Goods; and the ſaid Duty of 15 *l. per Cent.* paid within twenty Days after the Time of ſuch Sale, according to the Directions of the ſaid Act of Parliament in ſuch Caſe provided, and not otherwiſe.

And the Court thereupon did order and decree, that the Defendant ſhould account with her Majeſty for the Duties due to the Crown for the ſeveral unrated Goods, which had been by them imported ſince the 8th of *March* 1703. according to the Specimens N° 2 and 4 confirmed by the Court, for ſuch Sums of Money as ſhould appear to be due according to thoſe Specimens, over and above what had been already paid by them; and it was referred to the Deputy Remembrancer of the ſaid Court, to take the ſaid Account, according to the Directions and Declarations aforeſaid, and to report what was thereupon due from the Defendants to her Majeſty; but the Defendants were therein to account for the Duties of their own Goods only, and not for the Duties of ſuch Goods as ſhould appear to belong to private Perſons, who had Liberty, or were licenſed or permitted by the Defendants, to trade to the *Eaſt-Indies*.

Poſt page 14, 16.

In the taking of which Account, the Deputy was to make the Defendants all juſt Allowances, and to be armed with a Commiſſion for Examination of Witneſſes, for proving ſuch Account.

Proceedings in Purſuance thereof before the Deputy-Remembrancer.

Purſuant to this Decree, a Charge was exhibited before the Deputy Remembrancer on Behalf of the Crown, containing an Account of the Difference of the Duties payable for Goods which had been imported by the Defendants, according to the former Method of Computation, and of the Duties payable by the Method eſtabliſhed by the Decree,

amounting to the Sum of 26,222 *l.* 1 *s.* 8 *d.* ½; in which Account the Defendants were charg'd only with the Duties of Goods imported between the 28th of *November* 1705. the Time of the Arrival of the firſt Ship after they were conſtituted a Company, and 7th *September* 1713. And a farther Charge was afterwards exhibited before the Deputy on the Crown's Behalf, for the Duties of Tea for Home Conſumption, which had been omitted in the firſt Charge, amounting to the Sum of 4029 *l.* 10 *s.* 2 *d.* ſo that the whole Charge upon the Defendants amounted to the Sum of 30251 *l.* 11 *s.* 10 *d.* ½. The Defendants after great Delays, gave in their Diſcharge, containing an Account of the Duties of Goods imported by them which were not their own Goods, but belonging to private Perſons, who had Liberty, or were licenſed or permitted by the Defendants to trade to the *Eaſt-Indies*, amounting to the Sum of 6846 *l.* 4 *s.* 4 *d.* which by the Decree they were not to account for, and which they craved an Allowance of, out of the Duties charged upon them in the Charge given in on the Crown's Behalf.

Upon theſe Charges and Diſcharges divers Witneſſes were examined before the Deputy on both Sides, and ſo great a Progreſs was made in the Account, that the Deputy was ready to prepare a Draught of his Report; but the Defendants after all theſe Proceedings and Length of Time, thought fit to appeal from the ſaid Decrée to the Houſe of Lords.

The Defendants appeal to the Houſe of Lords.

I cannot but obſerve, that this Cauſe was defended in the Face of the moſt certain of all Sciences, the Mathematicks. It is alſo againſt the expreſs Words of the Act, *deducting the Queen's neat Duties*, and they deduct the groſs Duties. And it is alſo againſt the Meaning of the Act, that the Subject ſhould pay Duty for the Queen's Duty. And the Reſult of their Computation is, that all the Parts are not equal to the Whole: And that the more Duty is laid on, the leſs the Queen receives, becauſe you deduct more than you pay; for the higher you lay the Duties,

Reaſonings for the Crown.

the Deductions are the greater. The Defendants inſiſted the Queen's Method was intricate, and framed on fictitious Numbers by the Operations of Algebra, above common Capacities. The very Title of the Act gives an additional Duty, and this Computation takes it away: They do not ſay the Queen's Method is wrong, nor that theirs is right: So that indeed the Calculation of the *Eaſt-India* Company, was an Impoſition in all its Significations, *viz.* upon the Subject as a Tax, and on the Queen by Way of Fraud. The Defendants did acquieſce for * ſeventeen Years before they did appeal, and were ſo well ſatisfied with the Juſtice and Equity thereof, that they have complied with the Calculation thereby eſtabliſhed, in the Payment of theſe Duties, ever ſince the Decree pronounced in the Exchequer.

Hearing in the Houſe of Lords.

This Cauſe was heard in the Houſe of Lords, on *Monday* the 19th Day of *March* 1732, and was called in the Houſe of Lords, *The Algebraick Cauſe*; becauſe that was the cleareſt and beſt Method of Proof: Tho' it may be done by vulgar Arithmetick.

A State of the Method of computing the neat Duty.

The Sum which the Act charges with the Payment of this neat Duty is called *the neat Value:* And this neat Value has ever the ſame Proportion to the neat Duty, that the groſs Value has to the groſs Duty. Now the Act requires, that the neat Value, charged with the Payment of the neat Duty, ſhould be the groſs Value, diminiſhed by two ſeveral Sums; the one is the Sum (12 *l.* 10 *s.*) Part of the Allowance to the Company, for Warehouſe Room (6 *l. per Cent.*) and that for prompt Payment (6 *l.* ½ *per Cent.*) already determined and known; the other is, the neat Duty payable, which is quite un-

* The Company had no longer Time; for that by a ſtanding Order of the Houſe of Lords made 24th of *March* 1725. Appeals are to be brought within five Years after the Decree or Order, in the Court below, is ſigned and inrolled, *&c. Vide* the Order.

known

known, and the only Thing wanting. For it is expreſsly ſaid in the Act, that the neat Duty payable on the 100 *l.* groſs Value of *Eaſt-India* Goods, is not to be reckoned into the neat Value: And conſequently, the neat Duty payable (whatever it is) together with the Company's Allowance, muſt be deducted from the groſs Value, and the Remainder is to be the neat Value charged to pay the neat Duty payable: So that the Meaning of the Act is no more, than that the Sum or neat Value paying neat Duty, ſhould be the groſs Value, leſſened by that very Duty, and alſo by the Company's Allowance.

The Abſurdity of the Method for which the Company contended.

Now, in the Manner of computing by the Direction of this Act, there are two very different Methods, *viz.* a right Method and a wrong one: And a very ignorant Accountant cannot readily ſee how the neat Duty payable (which is as yet unknown) can be ſubducted from the groſs Value, in order to find the neat Value, paying the neat Duty: And therefore, without any farther Conſideration, he ſubducts the groſs Duty (inſtead of the neat Duty payable) together with the Company's Allowance, out of the groſs Value, and takes the Remainder for the neat Value paying Duty; and concludes, that this neat Value, has the ſame Proportion to the neat Duty, that the groſs Value has to its groſs Duty.

While the Company's Allowances continue to be 12 *l.* 10 *s.* as they now are, it is not in the Power of Parliament to lay a groſs Duty on the 100 *l.* groſs Value, that can poſſibly yield to the Crown a neat Duty of above 19 *l.* 2 *s.* 9 *d.* ½; and in order to raiſe ſo much Duty, the 100 *l.* groſs Value muſt be charged with only 43 *l.* 15 *s.* groſs Duty: If the 100 *l.* groſs Value is charged with more, as it is at preſent with 52 *l.* 2 *s.* 6 *d.* groſs Duty, (on *China* Ware) it muſt by this Method of Computation, produce a leſs neat Duty, as now it does only 18 *l.* 8 *s.* 9 *d.* ½; where-

as,

as, in computing by the Method directed in the Act, it would produce 29 *l.* 19 *s.* 7 *d.* ½, neat Duty; and if the 100 *l.* groſs Value was ſtill charged with a greater groſs Duty, it would conſequently by the common Method of Computation, ſtill produce a leſs neat Duty. This their Method of computing, as it is grounded upon a ridiculous Suppoſition, ſo the Practice thereof ſeems to be involved in one continued Blunder; as if the Intention of the Act ſhould be, that the more Impoſition is laid, the leſs will be the Duty payable to the Crown; or that the real Deſign of the Act, was to leſſen the Duty by laying on a greater.

In the next Place, if the 100 *l.* groſs Value was charged with 87 *l.* 10 *s.* groſs Duty, and the Company's Allowance 12 *l.* 10 *s.* the neat Duty produced would be nothing; for by this Method of computing, the neat Duty of 100 *l.* groſs Value, becomes nothing whenever the groſs Duty charged on 100 *l.* groſs Value, is equal to the Exceſs of 100 *l.* above the Company's Allowance. So that while the Company's Allowance is 20 *l. per Cent.* no Duty can be laid on the 100 *l.* groſs Value, that will yield the Crown a neat Duty of above 16 *l.*

It is indeed ſtrange, that any body ſhould be able to find a Difficulty in ſuch an eaſy Affair as this is; an Accountant but indifferently ſkilled, would by the Rule of Common Senſe only, and Common Arithmetick, as uſual in the like Caſes, inveſtigate a general Method, whereby the Computation will be ſtrictly performed.

By this true Method of Computation, the Sum of the neat Value, its neat Duty, and the Company's Allowances, is equal to, or makes up the groſs Value 100 *l.* as being the ſeveral Parts whereof it conſiſts: But by the Method hitherto uſed, what they call the neat Value, its neat Duty, and the Company's Al-

lowances, will not make up the whole groſs Value, tho' eſteemed to be all the Parts thereof; and this Computation may be made by the Common Rule of Three in Vulgar Arithmetick, as well as by Algebra.

The Computation may be made by the golden Rule of common Arithmetick.

After the Matter had been fully argued, the Houſe of Lords were unanimouſly of Opinion, that the Judgment in the Exchequer in this Cauſe, which I argued as Counſel for the Queen, ſhould be affirm'd; with this Variation, that the Account which the Appellants were to make to the Crown, ſhould be taken from the Time the Information was exhibited only, and not from the 8th of *March* 1703.

The Decree affirmed, with a ſmall Variation in Favour of the Appellants.

The following Specimens were printed on the Appeal in 1732.

Specimen N° 2.

Containing the Method inſiſted upon by the Attorney General for aſcertaining the Values, according to which the Duties are to be paid to his Majeſty, upon unrated *China Wares, referred to by the Information in the Court of* Exchequer, *and* confirmed by the Decree of that Court.

The granted or charged Duties by the ſeveral Laws and Statutes now in Force upon 100*l. Value of unrated China Wares, are as follows,* viz.

	Groſs Duties.			*Allowance for Prompt Payment.*			*Neat Duties.*		
	l.	*s.*	*d.*	*l.*	*s.*	*d.*	*l.*	*s.*	*d.*
Subſidy by 12 *Car.* 2. - - -	7	10	00	00	07	06	07	02	06
Impoſt by 2 *W. & M. cap.* 4. - -	20	00	00	01	05	00	18	15	00
New Subſidy by 1 Queen *Anne* - -	7	10	00	00	07	06	07	02	06
⅓ Subſidy by 2 Queen *Anne* - -	2	10	00	00	02	06	02	07	06
12 *per Cent.* by 3 Queen *Anne* - -	12	00	00	00	00	00	12	00	00
⅔ Subſidy by 3 Queen *Anne* - - - -	5	00	00	00	05	00	04	15	00
	54	10	00	02	07	06	52	02	06

EXAMPLE.

The groſs Price or Value at which the Goods are ſold by the Candle - -			100 0 0
The Allowance made for prompt Payment to the Buyer at Time	6 10 0		
The Allowance made to the Company for Charges in keeping the Goods till Sale - - - - - - - -	6 0 0		
Together			12 10 0
Remains			87 10 0
Then ſay, As 152*l.* 2*s.* 6*d.* is to 100*l.* ſo is 87*l.* 10*s.* to the neat Value			57 10 4½
According to which reduced Value the neat Duties payable to his Majeſty for the ſame Goods (in Proportion as 52*l.* 2*s.* 6*d.* is to 100*l.*) will be			29 19 7½
To which reduced Value and neat Duties ariſing from thence, if there be added the Allowances of 6*l.* 10*s.* to the Buyer at Time, and of 6*l.* to the Company for their Charges in keeping the Goods till Sale, making together			12 10 0
You will thereby diſcover the Truth of the Propoſition, by obſerving that theſe Parts make up the groſs Price or full Value without any Defect or Exceſs			100 0 0

Again,

The groſs Price or Value at which the Goods are ſold by the Candle - -			100 0 0
The neat Duties payable to his Majeſty for the ſame Goods	29 19 7½		
The Allowances of 6*l.* 10*s.* and 6*l.* making - -	12 10 0		
Together			42 9 7½
Remains (as above) for the neat Value -			57 10 4½

l.	*s.*	*d.*	
29	19	7½	the Duties payable by this Specimen.
18	08	9½	the Duties paid by the Appellants according to their Specimen N° 3.
11	10	10	Difference to the King.

Specimen N° 3.

Containing the Method inſiſted upon by the Appellants the Eaſt-India *Company for aſcertaining the Values, according to which the Duties are to be paid to his Majeſty, upon* unrated *China Wares, referred to by the Information in the Court of* Exchequer.

	l.	*s.*	*d.*
Out of the groſs Price or Value at which the Goods are ſold by the Candle	100	0	0
They take the granted or charged neat Duties on 100 *l.* (not the neat Duties payable to his Majeſty for the ſame Goods) - 52 2 6			
The Allowance for prompt Payment to the Buyer at Time - 6 10 0			
The Allowance to the Company for Charges in keeping the Goods till Sale - - - - - - - - - 6 0 0			
Together ———	64	12	6
Thereby reducing the groſs Price to - - - -	35	7	6
According to which reduced Value they compute the neat Duties which they make payable to his Majeſty for the ſame Goods, (in Proportion as 52 *l.* 2 *s.* 6 *d.* is to 100 *l.*) which amounts to no more than - - -	18	8	9½
To which reduced Value and neat Duties ariſing from thence, if there be added the Allowance of 6 *l.* 10 *s.* to the Buyer at Time, and of 6 *l.* to the Company for their Charges in keeping the Goods till Sale, making together	12	10	0
You will thereby plainly diſcover the great Abuſe, by obſerving, that theſe Sums put all together amount to no more than - - - -	66	6	3½
Which is ſhort of the groſs Price or Value at which the Goods are ſold -	33	13	8½
Of which 33 *l.* 13 *s.* 8 *d.* ½ the King receives no Part.			
Groſs Price	100	0	0

Again,

The groſs Price or Value at which the Goods are ſold by the Candle -	100	0	0
The neat Duties paid to his Majeſty for the ſame Goods - - 18 8 9½			
The Allowances of 6 *l.* 10 *s.* and 6 *l.* making - - - 12 10 0			
Together ———	30	18	9½
Remains inſtead of 35 *l.* 7 *s.* 6 *d.* - - - - - - - -	69	1	2½

N. B. By this Method there has been no more than 18 *l.* 8 *s.* 9 *d.* ½ paid to the King for Duties, when there has been allowed to the Company for the ſame Duties 52 *l.* 2 *s.* 6 *d.*

Specimen N° 4.

Containing the Method inſiſted upon by the Attorney General for aſcertaining the Values, according to which the Duties are to be paid to his Majeſty, upon unrated *Muſlins and Callicoes, referred to by the Information in the Court of* Exchequer, *and* confirmed by the Decree of that Court.

The granted or charged Duties upon 100*l. Value thereof are as follows,* viz.

	Groſs Duties.	*Allowance for Prompt Payment.*	*Neat Duties.*
	l. s. d.	*l. s. d.*	*l. s. d.*
Subſidy by 12 *Car.* 2.	5 00 00	00 05 00	04 15 00
Additional Duty	2 10 00	00 07 03	02 02 09
Impoſt by 2 *W. & M.*	20 00 00	01 05 00	18 15 00
New Subſidy by 1 Queen *Anne*	5 00 00	00 05 00	04 15 00
⅓ Subſidy by 2 Queen *Anne*	1 13 04	00 01 08	01 11 08
⅔ Subſidy by 3 Queen *Anne*	3 06 08	00 03 04	03 03 04
	37 10 00	02 07 03	35 02 09
15 *per Cent.* on the groſs Price by 3 Queen *Anne, cap.* 4.	15 00 00	00 15 00	14 05 00

EXAMPLE.

The groſs Price or Value at which the Goods are ſold by the Candle			100 0 0
The Allowance made to the Buyer at Time	6 10 0		
The Allowance made to the Company for their Charges in keeping the Goods	6 0 0		
The neat Duty of 15 *l. per Cent.* chargeable upon the groſs Price	14 5 0		
Together			26 15 0
Remains			73 5 0
Then ſay, As 135*l.* 2*s.* 9*d.* is to 100*l.* ſo is 73*l.* 5*s.* to the reduced Value			54 4 1
According to which reduced Value the neat Duties payable to his Majeſty for the ſame Goods in Proportion as 35*l.* 2*s.* 9*d.* is to the 100*l.* (beſides the neat Duty of 15*l. per Cent.* payable to his Majeſty upon the groſs Price) will be			19 0 11
The neat Duty of 15*l. per Cent.* on the groſs Price			14 5 0
To which reduced Value and neat Duties, if there be added the Allowances of 6*l.* 10*s.* to the Buyer at Time, and of 6*l.* to the Company for their Charges in keeping the Goods till Sale, making together			12 10 0
You will thereby diſcover the Truth of the Propoſition, by obſerving that theſe Parts make up the groſs Price or full Value at which the Goods are ſold, without any Defect or Exceſs			100 0 0

Again,

The groſs Price or Value at which the Goods are ſold by the Candle			100 0 0
The neat Duties payable to his Majeſty for the ſame Goods	33 5 11		
The Allowances of 6*l.* 10*s.* and 6*l.* making	12 10 0		
Together			45 15 11
Remains (as above) for the neat Value			54 04 01

l.	*s.*	*d.*	
33	5	11	the Duties payable by this Specimen.
27	12	10	the Duties paid by the Appellants according to their Specimen N° 5.
5	13	1	Difference to the King.

Specimen N° 5.

Containing the Method inſiſted upon by the Appellants the East-India *Company for aſcertaining the Values, according to which the Duties are to be paid to his Majeſty, upon* unrated *Muſlins and Callicoes, referred to by the Information in the Court of* Exchequer.

	l.	*s.*	*d.*
The groſs Price or Value at which the Goods are ſold by the Candle -	100	0	0
The Allowance made to the Buyer at Time - - 6 10 0			
The Allowance made to the Company for their Charges in keeping the Goods till Sale - - - - - - - 6 0 0			
The Sum which they take out as the neat Duties payable to his Majeſty for the ſame Goods - - 49 7 9			
Together ——	61	17	9
Thereby reducing the groſs Price to - - - -	38	2	3
According to which reduced Value they compute the neat Duties payable to his Majeſty for the ſame Goods, in Proportion as 35*l.* 2*s.* 9*d.* is to 100*l.* which amounts to no more than - - - -	13	7	10
Beſides the neat Duty of 15 *l. per Cent.* chargeable upon the groſs Price	14	5	0
To which reduced Value and neat Duties, if there be added the Allowance of 6*l.* 10*s.* to the Buyer at Time, and of 6*l.* to the Company for their Charges in keeping the Goods till Sale, making together -	12	10	0
You will thereby plainly diſcover the great Abuſe, by obſerving, that theſe Sums put all together amount to no more than - - -	78	5	1
Which is ſhort of the groſs Price or Value at which the Goods are ſold -	21	14	11
Of which 21*l.* 14*s.* 11*d.* the King receives no Part.			
Groſs Price	100	0	0

Again,

The groſs Price or Value at which the Goods are ſold by the Candle -	100	0	0
The neat Duties paid to his Majeſty for the ſame Goods - - 27 12 10			
The Allowances of 6*l.* 10*s.* and of 6*l.* making - - 12 10 0			
Together ——	40	2	10
Remains inſtead of 38*l.* 2*s.* 3*d.* - - - - - - -	59	17	2

N. B. By this Method there has been no more than 27*l.* 12*s.* 10*d.* paid to the King for Duties, when there has been allowed to the Company for the ſame Duties 49*l.* 7*s.* 9*d.*

DE
Term. Sanct. Hill.

11 *Annæ Reginæ.*

In the EXCHEQUER.

William Darbiſon (on the Demiſe of Thomas Long) Plaintiff;

AND

John Beaumont and Dorothy his Wife, Defendants.

A Deviſe in Remainder to the Heirs Male of the Body of a Perſon living at the Time of the Will, and alſo when the Remainder ſhould take Effect.

BY Direction of the Court of Exchequer, an Ejectment was brought to try the Title of ſeveral Lands in *Cornwall*, of about 600 *l. per Annum*, late the Eſtate of *John Speccot*, Eſq; deceaſed.

A ſpecial Verdict, finds a Will.

And a ſpecial Verdict was found, whereby it appears, that the ſaid *John Speccot*, being ſeiſed of the ſaid Lands, the 19th day of *Auguſt* 1703, made his laſt Will and Teſtament in Writing, and thereby declares, that as to all his Eſtate, both real and perſonal, of what Kind ſoever, he diſpoſes and limits as therein follows. And firſt, he directs and appoints, that all his Debts, Legacies and Funerals be paid by his Executors; and if his perſonal Eſtate was not ſufficient, then to be paid out of his real Eſtate.

And for that Purpoſe, he deviſed all his Lands unto his loving Couſins *John Sparke* and *Jonathan Sparke*, for twenty-one Years, in Truſt to pay his Debts, Legacies and Funerals;

and that when his Debts, Legacies and Funerals ſhould be diſcharged, the ſaid Term ſhould determine and be void.

And from and after the Determination of that Eſtate, then he deviſes the ſame Lands unto the firſt Son of his Body lawfully to be begotten, and to the Heirs Male of the Body of ſuch firſt Son; and in Default of ſuch Iſſue, to the Heirs of his Body lawfully to be begotten; and for want of ſuch Iſſue, then unto his Couſin *John Sparke*, for the Term of ninety-nine Years, if he ſhould ſo long live; and after his Deceaſe, to the firſt Son of the ſaid *John Sparke*, and to the Heirs Male of the Body of ſuch firſt Son, and to the ſecond and every other Son of the Body of the ſaid *John Sparke* to be begotten, in Tail Male. Then to his Couſin *Jonathan Sparke* for ninety-nine Years, and to his firſt, and every other Son to be begotten, in Tail Male. Then comes the Limitation, on which the Queſtion is made, which immediately follows, and runs thus:

The Clauſe on which the Queſtion ariſes.

And for and in Default of ſuch Iſſue, I give and deviſe the Remainder of all my ſaid Eſtate, to the Heirs Male of the Body of my Aunt, Mrs *Elizabeth Long*, Wife of *Richard Long*, Clerk, lawfully begotten; and for and in Default of ſuch Iſſue, the Reverſion and Remainder of all my ſaid Lands and Eſtate, to be and remain to my right Heirs for ever.

The Jury find the Will, *in hæc Verba*, in which he takes Notice of his Siſter and Heir *Dorothy*, the Defendant Dr. *Beaumont*'s Wife; and that he had 2450 *l.* of hers in his Hands, which he directs his Truſtees to pay; and then gives his ſaid Siſter an Annuity of 150 *l.* out of the ſaid Lands ſo limited to the ſaid *Long*, during her Life; and then gives 500 *l.* apiece to the Children of his ſaid Siſter *Dorothy* the Defendant, if ſhe ſhould have more than one; and if but one, 1000 *l.* payable out of the ſaid Lands.

Then he takes Notice, that his Aunt *Elizabeth Long* was living, and had Children, for he gives her a Legacy of 100 *l.* and ſome ſmall Matter to the Children of his Aunt *Elizabeth Long*.

The

The Jury further find, that the Teſtator *John Speccot* died the 25th of *Auguſt* 1703, without Iſſue; and that the ſaid *John* and *Jonathan Sparke* entered and were poſſeſſed, and raiſed ſufficient to pay Debts, Legacies and Funerals; and find that the ſaid Term of twenty-one Years is ended and determined.

Then they find, that the ſaid *John* and *Jonathan Sparke* both died without Iſſue; and that the Defendant *Dorothy Beaumont*, Wife of the Defendant *John Beaumont*, is Siſter and Heir of the ſaid Teſtator *John Speccot*; by Virtue of which, they in Right of *Dorothy*, entered, after the Determination of the ſaid Term of twenty-one Years.

Then 'tis found, that the ſaid *Elizabeth Long* (Aunt of the ſaid Teſtator) had, at the Time of making the ſaid Will, three Sons of her Body begotten, and no more; and that *Thomas Long*, the Leſſor of the Plaintiff, was then the eldeſt Son of the ſaid *Elizabeth Long*, and that ſhe was alive at the Time of the Death of the ſaid Teſtator, and is ſtill living.

The ſpecial Verdict was argued twice before the Barons of the Exchequer, by Counſel on both Sides; wherein the general Queſtion was, between the Defendant *Dorothy* (who claimed as Heir of the Teſtator) and the Leſſor of the Plaintiff, *Thomas Long*, who claimed by the Will, as being the Perſon deſigned therein by the Limitation to the Heirs Male of the Body of his Aunt *Elizabeth Long*, lawfully begotten, antecedent to the Limitation to the Teſtator's right Heirs.

The Queſtion; Whether a Remainder which is limited by Will to the Heirs Male of a Body of a Perſon who is living when the Remainder ſhould take Effect, be a good Remainder.

The particular Queſtion on this ſpecial Verdict was, whether the Leſſor of the Plaintiff *Thomas Long*, the eldeſt Son and Heir apparent of *Elizabeth Long* his Mother, ſhe being living, could take any Eſtate by the ſaid Limitation in the Will. It being objected, that *Nemo eſt Hæres Viventis*; and that Mrs. *Long* being living, there could not, in Propriety of Law, be any Heir Male of her Body begotten, to take by this Will.

I ar-

I argued this Cauſe in the Exchequer firſt of all, for the Leſſor of the Plaintiff, wherein he obtain'd Judgment; and after that, I argued it in the Houſe of Lords, where that Judgment was affirm'd. My Argument was to this Effect, that this Limitation to the Heirs Male of the Body of *Elizabeth Long*, (tho' living) is a good Limitation, ſo as to veſt a good Eſtate Tail in her eldeſt ſon, by an expreſs Deſignation of the Perſon, and by a neceſſary Implication. It is true, according to the general Senſe and Meaning of the Word *Heir*, and according to the ſtricteſt Meaning, the Leſſor of the Plaintiff is not Heir as long as his Mother lives; but here is ſo plain a Deſignation of the Perſon, and ſo evident and full a Deſcription of him, that in a Will it is tantamount to a Limitation to the firſt and every other Son of *Elizabeth Long*. In a Deed the Law is ſtrict, becauſe it is always ſuppoſed to be made by the Advice of Counſel; and therefore legal Words, and Terms of Art, that have a fix'd and ſettled Signification, in the Law, are always made uſe of and inſerted, to avoid Diſpute. But in a Will a Man is ſuppos'd to be *in Articulo Mortis*, to have no Counſel or Friend to adviſe him, and therefore he is excuſed from uſing technical Words, and Law Phraſes (which in Deeds are neceſſary); nor is he tied down to Forms of Speech, but has a Liberty, to expreſs his laſt Deſires, in ſuch Words as he has learn'd in the Courſe of his Education; and therefore *Dyer* ſays, in *Plowd. Com.* 414. That a Man has a Power in his laſt Will, like to an Act of Parliament. This then being the Caſe, I hope to make it out, that the Expreſſion the Teſtator has uſed, is not even improper in this Caſe; but the Objection is, *Nemo eſt Hæres Viventis*, that they ſay is a Maxim; it is more properly called a Definition, which makes it one Sort of Heir, only ſuch, as is in its moſt ſtrict Senſe; that is, he that my Lord *Hobart* calls Heir *in concreto*, which means one to whom Lands actually deſcend in Right of Blood, from a dead Anceſtor, and ſo is *Co. Litt.* 7. *Hob.* 31. And this Definition he has from the Civil Law, which ſays *Hæredes ſunt qui in Jus Defuncti ſuccedunt. Calvin's Lexicon.* Now take it in this ſtrict Senſe, no Perſon can be Heir, unleſs his Anceſtor had an Eſtate to deſcend. Therefore there is another more ex-

Mr. *Fortescue A.'s* Argument in Support of the Deviſe.

Difference between a Deed and Will, as to Latitude of Conſtruction; the Reaſon for it.

The various Significations of the Word *Heir*.

tenſive Meaning of the Word, which is, Heir *in abſtracto*; one who upon the Death of his Anceſtor would inherit his Lands, if he left any, *i. e.* one capable of inheriting; and this is the Senſe this Word generally has in Deeds and Wills, where the Limitations are to the Heirs of other Perſons. Again, by the Word *Heir* is underſtood, either *ſimpliciter*, *i. e.* Heir at Common Law; or *per accidens*, *i. e.* Heir by Cuſtom; as Heir by *Gavelkind*, that denotes all the Sons, that in *Borough Engliſh* denotes the youngeſt. In the laſt Place, there is another Meaning of the Word *Heir*, which is neareſt our Purpoſe, and the moſt common and vulgar Acceptation of the Word, and that is what my Lord *Hobart* calls an Heir *ſecundum quid*, *i. e.* Heir apparent, or nominal Heir, one who would inherit were his Anceſtor dead, one who ſtands next the Parent, and would inherit were his Parent dead; and this Heir is taken Notice of in our Law. *Litt. ſect.* 42, 114. *Bract. lib.* 2. *ca.* 33.

That *Heir* may ſignify the Heir apparent.

Now, among the various Meanings of the Word *Heir*, I hope to make it appear, that the Teſtator meant it in this laſt Senſe of the Word *Heir*; that is, ſuch Perſons as would be Heirs to his Aunt *Elizabeth Long*, if ſhe were then dead. But it may be ſaid, that no Teſtator ſhould have a Meaning againſt Law, and therefore I will mention ſome Authorities both from Statutes and Law Books, ancient and modern, wherein Heir apparent, or the firſt Son, has been underſtood by the Word *Heir*, in the Life of the Anceſtor. *Weſtm.* 2. *cap.* 35. 13 *Ed.* 1. which gives the Writ of Raviſhment of Ward, ſays, that if any one ſhall by Force take away or marry the Heir of any Perſon, ſuch Perſon may have a Writ of Raviſhment of Ward. If the eldeſt Son or only Daughter of any Man be taken away by Force; the Writ is, *Quare Filium & Hæredem* of ſuch a one *contra Voluntatem rapuit.* 2 *Inſt.* 439. 2 *Vent.* 313. So in the Caſe of an only Daughter of Mr. *Eriſeys* in *Cornwall*, in the Caſe of *The Queen* and *Killigrew*, the Indictment was *Quare filiam & hæredem, &c.* There is the Statute of *Merton*, 21 *H.* 3. *cap.* 6. concerning Wards, begins thus, Of Heirs that are led away or by Force married. So there is *Stat. Marl.* againſt fraudulent Conveyances, begins thus, As touching them that uſe

Proofs from Statutes.

to infeoff their eldeſt Sons and Heirs, being within Age, to defraud the Lord. The 25 *Ed.* 3. *cap.* 2. is very material; it is the Statute of Treaſons: It is there declared High Treaſon, to compaſs or imagine the Death of the eldeſt Son and Heir of the King, or to violate the Wife of the King's eldeſt Son and Heir. *Litt. ſect.* 103. The *Mirror of Juſtices, cap.* 1. *ſect.* 3. ſays, the Heir ſhall forfeit nothing in Prejudice of his Anceſtor, living the Anceſtor. *Glanvil* 45. 6. No one, ſays he, having a Son and Heir, can give any of his Inheritance to a Baſtard, without the Conſent of ſuch Heir; but if he have no Son and Heir, nor Daughter and Heir of his Body begotten, he may diſpoſe of all as he pleaſes: This is exceeding ſtrong, for here are our very Words *Heirs Male of the Body.* Now ſince the Word *Heir* has ſo many various Significations, and is allow'd in the Law to be uſed in the Senſe I contend for; it is unreaſonable, and a Violation of all the Rules of Expoſition, to ſay, it muſt be meant in that Senſe, which is the only one that will ſet aſide the main Deſign and Scope of the Will. 'Tis hard to ſay, that a Man who lies at the Point of Death, and has no Adviſer, ſhall not be allowed to uſe that Language which is to be found in our Law Books, and allowed in our Proceedings at Law. But ſuppoſing, after all, it ſhould not be a proper Term, yet if the Teſtator has a Mind to make uſe of it, and his Meaning and Intent be clear and apparent what Perſon he means in a Will, it is ſufficient; and why may not this Gentleman, in uſing this Term *Heir*, be as well underſtood as a Statute, a Writ, or a Law Book; and why may not a Judge underſtand it as well in a Will as a Writ.

The Intention of the Party works ſtrongly in a Deed, but much more in a Will: My Lord *Hale* ſays, the Intention of the Teſtator, is the Law to expound Wills; and the true Reaſon why a Man had greater Liberty in a Will than in a Deed, was given by the Lord Chief Juſtice *Holt*, in the Caſe of *Idle* and *Cook*; becauſe by the Statute of Wills, 32 *H.* 8. ſuch a Liberty is given; for that Act ſays, a Man may diſpoſe of his Lands *according to his own free Will and Pleaſure, i. e.* to uſe ſuch Words, Terms and Phraſes, as he thinks proper. I will mention ſome Caſes to that Purpoſe:

2 Salk. Rep. 620.
3 D'Anv. Abr. 186. pl. 14.

A De-

A Deviſe of Land to the Earl of *Hertford, Lord Treaſurer*; tho' this Appellation was not then true, yet 'tis made good by Reputation, tho' no ſuch Perſon ſtrictly, *Hob.* 32. becauſe of the apparent Intent of the Party. And this vulgar Notion of the Word *Heir*, falls in with the Civil Law, which calls Children *Domeſtici Hæredes, & vivo quoque Patre, quodammodo Domini exiſtimantur.* Calvin's Lex'.

A Deviſe *Eccleſiæ Sanct. Andreæ Holborn*, is a good Deviſe to the Rector of that Church and his Succeſſors; and yet no Perſon deſcribed in the Will; but becauſe it was thought probable, the Rector was intended, therefore his Meaning muſt take Place, becauſe the Words cannot; which is ſtronger than our Caſe. There is, *Fitz-H. tit. Deviſe*, 27. *Plowd.* 345. 10 *Co.* 57. *Hob.* 33. Deviſe to one and his Heirs Male, this is a good Eſtate-Tail, tho' not ſaid of what Body, for the apparent Intent of the Party; and yet there is no ſuch Heir in the Law, which would be void if it were in a Deed; which is a ſtronger Caſe than ours, for here the Words, *of the Body*, are ſupplied, and in ours only explained; beſides, he might not mean *Heirs of his Body*, but in our Caſe impoſſible to mean otherwiſe than Son. 27 *H.* 8. 27. 1 *Vent.* 229. Lord *Hale*, in the Caſe of *Pibus & Mitford*, 1 *Vent.* 381. is of Opinion, that even in a Covenant to ſtand ſeiſed to the Uſe of the Heirs Male of the Body of *J. S.* by his ſecond Wife, that the Son by the ſecond Venter ſhould take, tho' there was a Daughter by the firſt Venter, who was ſtrictly Heir; becauſe he was a ſpecial Heir, according to the Intent of the Party: For, as my Lord *Hobart* ſays, tho' none can be truly Heir but he that the Law makes ſo, yet there is an Heir by Appellation and vulgar Acceptation, which imitates the State of a true Heir; and therefore, if by Will I appoint, that *J. S.* ſhall be Heir of my Land, he ſhall have it in Fee: For ſuch Eſtate as his Anceſtor had, ſuch he is to inherit. *Hob.* 75.

2 D'Anv. 556.
3 D'Anv. 158.
3 Keb. 129, 239, 316.

The next Queſtion is, Whether the Teſtator intended the Leſſor of the Plaintiff to take as Heir apparent: And I think here

The Intention was, that the Deviſee ſhould take as Heir apparent; for his Mother was mentioned as living.

here is a plain and manifeſt Intention; he takes Notice that his Aunt was living; for he mentions her to be the Wife of *Richard Long*, Clerk; not only ſo, but gives her a Legacy of 100 *l.* From hence it follows neceſſarily, he meant *apparent*, in the vulgar Senſe; that is, the firſt Son; for he could not mean Heirs of a dead Anceſtor, but the Heirs of a living one; and that is, Heir Apparent. Again, the next Heir is expreſsly diſinherited, and the Defendant had no Eſtate deviſed to her; and had only the Expectation of a dry Reverſion, after ſeveral Eſtates-Tail; which is of no Conſideration in the Law: And there is a further Argument why it muſt be taken to be Heir apparent; becauſe the Heir general cannot take, till Failure of Iſſue in his Aunt *Elizabeth Long*. The Words are, *in Default of ſuch Iſſue, i. e.* of *Elizabeth Long*, the Reverſion and Remainder of all my ſaid Lands and Eſtate, to be and remain to his own right Heirs: Theſe Words infer a ſtrong Negative, and are as much as if he had ſaid, that as long as there is Male Iſſue of *Elizabeth Long* in Being, my right Heirs ſhall not inherit; or as if he had ſaid, on Failure of Iſſue of *Elizabeth Long*, then, and not till then, my Heir ſhall have it; ſo that if the Iſſue of *Elizabeth Long* cannot take, no Body can. Like the Caſe of 13 *H.* 7. 17. A Man deviſes, that after the Deceaſe of his Wife, his Son and Heir ſhould have his Houſe; it was held, his Son and Heir in this Caſe could not have the Houſe during his Wife's Life; for altho' it is not expreſsly deviſed to her, yet by neceſſary Intendment, the Wife muſt have it, elſe no body can; for it cannot deſcend to the Heir, becauſe the Teſtator had broke the Deſcent. Now, according to their Conſtruction, the Teſtator muſt be *inops Mentis*, as well as *inops Concilii*, that for three Lines together, he ſhould expreſs himſelf in Terms very plain and very ſignificant, but ſhould mean Nothing by them.

Another negative Implication.

No Man is ſuppoſed to uſe any Words without ſome Meaning, and ſo is the Rule of Law laid down in *Plowd. Com.* 523, 540. That not one Word of a Man's Will is to be paſſed off, if it may bear any reaſonable Senſe or Meaning. A Deviſe to a Man and his Iſſue, if the Deviſee had Iſſue, it is a joint Eſtate to them all; but if he have no Iſſue, the

No Words in a Will to be rejected if they may have a reaſonable Conſtruction.

Deviſee ſhall take an Eſtate-Tail; but how is that, ſay the Books, ſince Iſſue cannot take *in præſenti*, there being no Iſſue; rather than that Word ſhall be void, they ſhall take *in futuro*. 6 *Co. Wild*'s Caſe. Whereas in a Deed, the Donee has but an Eſtate for Life. *Co. Litt.* 20. *b.* 1 *Vent.* 382. There is a Caſe of the 26 *Eliz.* quoted by Lord *Hale*; A Man takes Notice in his Will, that his Brother was dead, and had a Son; and he himſelf had three Daughters, who were his right and immediate Heirs; he gave them 2000 *l.* but gave his Land to his Heir Male; it was held, that this was a good Deviſe to his Brother's Son, tho' not Heir, nor perhaps ever would, yet held a good Name of Purchaſe. The next Caſe is *Burchet* and *Durdant*, 2 *Vent.* 312. which is the ſame Caſe with ours, but not quite ſo ſtrong; it had formerly been diſputed under the Name of *James* and *Richardſon*, 1 *Vent.* 334. 2 *Lev.* 232. *Raym.* 330. 2 *Jones* 99. *Pollexfen* 457. where a Deviſe to the Heirs Male of the Body of *Robert Durdant* then living, was adjudg'd twice in the King's Bench, once in the Exchequer Chamber, and twice affirm'd in the Houſe of Lords; and held to be a good Limitation to *George* the eldeſt Son of *Robert Durdant*, tho' *Robert Durdant* was living. Now there can be no great Difference between Heirs Male of the Body of *Robert Durdant*, now living, and Heirs Male of the Body of my Aunt *Long*, now begotten; theſe Words *now begotten* being tantamount to *now living*.

3 D'Anv. 181. pl. 17, 18.

Eq. Abr. 181. pl. 15.

3 D'Anv. 515. pl. 7. Carth. 154.

Eq. Abr. 214. pl. 11. Skin. 205.

If that Caſe be Law, which has been adjudged ſo often, ours is ſo too; that the Leſſor of the Plaintiff takes by Purchaſe, and that it was a Remainder veſted in the Life of *Elizabeth Long*, and that this is a ſufficient Deſignation of the Perſon to take; and is as much as if he had ſaid, *to his Heirs apparent*. Every Circumſtance in this Caſe of *Burchet* and *Durdant*, is in ours; and in our Caſe are ſome ſtrong Circumſtances not in that. The firſt Reaſon in our Caſe is, that the Teſtator took Notice that the Anceſtor was living, and therefore could not intend Heir general, but a particular Heir, *i. e.* Heir apparent. Our Caſe is the ſame, nay ſtronger, for there it was only found, that *George* was Godſon and Nephew to the Deviſor; which might be, and yet he not know his Godſon was living; but here a Legacy is given her,

3 Keb. 832.

her, and not only ſo, but by expreſs Words alſo, he calls her the Wife of *Richard Long*, Clerk. In the next Place, *George Durdant* was Heir apparent, *i. e.* Heir in common Parlance, and he deſcrib'd him in this Manner, becauſe the Name perhaps might not occur to the Memory of the Teſtator. All this happens in our Caſe, the Leſſor of the Plaintiff is Heir apparent. Then there is another material Circumſtance in that Caſe, and that is *now living*; which demonſtrated who he meant.

So it goes in Qualification of the ſtrict Notion of Heir, and ſo denoted and explain'd it to be Heir apparent. Now in our Caſe we have Words of the ſame Import and Signification, and thoſe are, *lawfully begotten*; Heirs of the Body *now living*, and Heirs of the Body *now begotten*, being tantamount to *now living*; and this Meaning is greatly enforced by the Diſtinction and Oppoſition the Teſtator himſelf has made between Heirs of the Body begotten, and Heirs of the Body to be begotten: Where the Limitations in this Will, are to Heirs Male of the Body, where there were none living, he always and in every Place ſays, Heirs of the Body to be begotten; and in the only Place where there was Iſſue, he ſays, Heirs of the Body begotten; and in no leſs than five Places, he ſays, to be begotten, where he knew there was no Iſſue; and in the only and laſt Place, where he knew there was Iſſue, and had taken Notice of them, he varies his Phraſe, drops the future Tenſe, and puts it in Words *de præſenti*, Heirs of the Body begotten. This could not well happen to be by Accident; it is ſcarce poſſible the laſt of ſix Expreſſions ſhould vary from the five firſt, unleſs it was deſign'd. Now in the former Caſe ſuch Conſtruction was made to ſupport the Will, and the Intent of the Party; but here to conſtrue this to extend to future Heirs, would be for no other Purpoſe than to make the Will void, and to defeat the main Intent of the Deviſor. When a Man ſpeaks improperly in a Will, the Law will ſometimes ſuppoſe he meant properly; as if he ſay, *Hæredibus procreatis*, if there be no Iſſue, the Law will ſuppoſe he meant *procreandis*, to ſupport the Will. But when a Man ſpeaks properly, to ſuppoſe and intend he meant improperly, ſo as to deſtroy the Will, as in this

An Argument from the Teſtator's Variation of Expreſſion in different Parts of the Will.

this Caſe, is ſuch a Conſtruction as I believe was ſcarce ever heard of. Again, in that Caſe 'tis deviſed to the Heirs Male of the Body of *Robert Long*, now living, and for Want of ſuch Heirs, then over; but our Words are, *in Default of ſuch Iſſue*, which points out to his Aunt's three Sons only, and their Iſſue, which makes our Caſe much ſtronger; for thereby the ſevere Expreſſion of *Heirs* is ſoftened, by ſhewing what Heirs he meant, ſuch as were Iſſue of the Body; and hereby an Eſtate-Tail, by neceſſary Implication, is veſted in the three Sons by Succeſſion one after another; and by this it appears, that the Deviſor, by Heirs Male of the Body, meant Iſſue Male; now Iſſue of the Body is of the ſame Import as Heirs of the Body, as appears by the Statute *De Donis*, of *Weſtm.* 2. and many other Authorities. And if this had been a Deviſe to the Iſſue of *Elizabeth Long*, the Words ſubſequent, *and in Default of ſuch Iſſue*, would have made it an Eſtate-Tail, in the Leſſor of Plaintiff; and ſo in Succeſſion to the other Sons. Nor is it any Objection to ſay, that it would be uncertain which of the Iſſue ſhould take firſt; for if a Deviſe be to the Iſſue and their Iſſue; and there be more than one, it muſt go to the eldeſt in a Courſe of Deſcent; otherwiſe *Iſſue* would not be *Nomen collectivum*; and this was the Opinion of my Lord *Hale*, in 1 *Vent.* 229. who explodes the Doctrine of the Uncertainty of ſuch a Deviſe; and ſays, that the Caſe of *Sayer* and *Taylor*, which is that way in 3 *Cro.* 742. is too rank to paſs for Law. There is the Caſe too of *Lodington* and *Kime*, 3 *Lev.* 431. Deviſe to *Evers Armin* for Life, and in Caſe he ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs; this was held to be a good Deviſe to the firſt Son and Heir Male in Tail, and that he took by Purchaſe. And here it was objected, that it was uncertain which of the Male Iſſue ſhould take firſt; but held by the whole Court, that the Heir ſhall not be diſinherited by Probabilities; but here it is by expreſs Terms, for the Heir is not to take, as Heir, till after the Failure of Iſſue Male of *Elizabeth Long*. So is 13 *H.* 7. 17. *Bro. Deviſe* 52. A Man deviſes his Goods to his Wife; and after the Death of his Wife, that his Son and Heir ſhould have his Houſe; here Son and Heir cannot have the Houſe, during his Wife's Life; for though not expreſsly deviſed to his Wife, yet by neceſſary In-

Iſſue of the Body of the ſame Import as Heirs of the Body.

3 D'Anv. 183. pl. 24. Eq. Abr. 182. pl. 23. 1 Salk. 224.

tendment the Wife muſt have it, elſe no body can; for it cannot deſcend to the Heir, becauſe the Teſtator has broke the Deſcent. *Vaugh.* 263. So here, if the Iſſue of *Elizabeth Long* cannot take, no Body can; for the Heir cannot inherit, by the expreſs Words of the Will, till Failure of Iſſue Male of *Elizabeth Long*: Now to ſuppoſe him to have no Meaning in theſe three Lines together, is to ſuppoſe him *inops Mentis*, as well as *Concilii*; ſo that the eldeſt Iſſue Male ſhould take, even tho' they were Twins, he that was the firſt born ſhould take. So is *Dyer* 333. A Deviſe to the Houſe or Family of ſuch a One, held to be a good Deviſe to the Chief and Eldeſt Perſon of the Family, according to the Courſe of Common Law. But after all, the Words *now living*, might have another Senſe, but the true Reaſon was, that this was the moſt probable Reaſon, and moſt agreeable to the Intent of the Party. In the next Place, the Conſequence of this Conſtruction they contended for in that Caſe, was not ſo fatal as in ours, for if in that Caſe they had rejected the Words, *now living*, that would have cut off but one ſingle Branch of that Family; it would have ſet aſide only *George Durdant*; for if there were other Iſſue born after, as there might be, thoſe would have enjoyed this Eſtate by the ſubſequent Words, *and to ſuch other Heirs Male and Female, as he ſhould hereafter happen to have.* But in our Caſe, not only the Leſſor of the Plaintiff, but all the Family of the *Longs*, Root and Branch, are to be cut off, and ſet aſide, tho' the Heir at Law is expreſly poſtponed to all the Iſſue of *Elizabeth Long*.

But then 'tis objected, if the Leſſor of Plaintiff take by Purchaſe and by Deſignation of the Perſon, he can take but an Eſtate for Life. *Anſwer*: He ſhall take an Eſtate-Tail, and ſo it was held in the Caſe of *Burchet* and *Durdant*, and is there reſolved as the third Point of that Caſe; for the Court held, that the Words, *Heirs of the Body now living*, would make an Eſtate-Tail, tho' the Son took by Purchaſe, becauſe *Heirs* is *Nomen collectivum*, and is ſometimes ſo taken when 'tis only Heir in the ſingular Number, as a Deviſe to one for Life, Remainder to the Heir Male of his Body, this is an Eſtate-Tail in the Deviſee;

An Objection; anſwered.

Heirs of the Body now living carry an Eſtate-Tail

2 D'Anv. 556. pl. 4. 2 Rol. Abr. 794. pl. 6.

viſee; ſo is the Caſe of *Panſey* and *Lother*, 2 *Roll's Abr.* 253. but then it may be ſaid that the ſubſequent Words in that Caſe helped to make it an Eſtate-Tail, for the ſubſequent Words, which are, *and to ſuch other Heirs Male and Female, as he ſhall hereafter happen to have of his Body*, that is, as *Robert* the Father ſhould have, give every other Son of *Robert* an Eſtate-Tail; but they do not at all affect the Eſtate of *George*, which ſubſiſts only on the Words *Heirs of the Body of* Robert *now living*; for by the other Words he is excluded. But this is no new Objection; for Mr. Juſtice *Dolben*, the only Judge againſt that Judgment, made the ſame Objection, but was over-ruled. Nay, 'tis ſaid in 2 *Lev.* 232. that after the firſt Judgment in the Caſe of *James* and *Richardſon*, a new Ejectment was brought of other Lands in the ſame Will, after the Death of *George Durdant* the Son, againſt his Heir, to try this very Point again; and it was adjudged over again, and the Judgment affirm'd in the Houſe of Lords, that *George* took a Fee-Tail, and not an Eſtate for Life only.

Another Objection;

In the laſt Place 'tis objected and ſtrongly inſiſted on, that if *Thomas* the eldeſt Son take by Purchaſe, tho' he ſhould take an Eſtate-Tail, yet that none of the reſt of the Children can take.

anſwered.

There is a full Anſwer to that; the ſubſequent Words *in Default of ſuch Iſſue*, will make it an Eſtate-Tail by Implication, to all the Iſſue; for if *Heirs of the Body*, are here Words equivalent to *Iſſue of the Body*, as we contend they are; then theſe Words, *in Default of ſuch Iſſue*, plainly make an Eſtate-Tail; and ſo is the Opinion of my Lord *Hale*, in the Caſe of *King* and *Melling*, 1 *Vent.* 230. Deviſe to his Son *Bernard* for Life, and after his Deceaſe to the Iſſue of his Body, and for Want of ſuch Iſſue, then over; which Words in a Will, ſays he, make an Eſtate-Tail by Implication; and that the Remainder over could never take 'till Iſſue fail'd. But there is another Anſwer to this, and that is, that this very Objection has been over-rul'd in that Caſe of *Burchet* and *Durdant*; for if in that Caſe, the Eſtate had veſted in *George* by Purchaſe, and he had the Inheritance, the other Iſſue which took by Deſcent from the Anceſtor, could not take

S. C. 1 Vent. 214. 3 D'Anv. 182. pl. 21. Eq. Abr. 181. pl. 14.

take at all, and this very Argument was uſed by Mr. Juſtice *Dolben*, who was againſt the Judgment: By this Conſtruction, ſays he, the Heirs born after are excluded; and yet that did not prevail. 1 *Vent.* 334.

The Sum of the Argument is this, This dying Man has expreſs'd himſelf, tho' not in the ſtricteſt Terms, yet in ſuch Terms as the Law allows and owns. The Language he uſes is to be found in Statutes, Law Books and Records. Here is no Eſtate deviſed contrary to the Rules of Law, nor any Maxim of Law broken; according to our Conſtruction, every Line of this Will is ſignificant, and every Word has ſome Meaning, and all the Parts are conſiſtent one with another: But according to their Conſtruction, a Man is made to ſpeak for three Lines together, and to mean nothing; and a whole Family is ſet aſide, againſt the expreſs Words of the Teſtator. The Argument briefly recapitulated.

After long Debate and Conſideration, the Lord Chief Baron, and the reſt of the Barons (except Baron *Bury*) were of Opinion, that the Leſſor of the Plaintiff, *Thomas Long*, the eldeſt Son of *Elizabeth Long*, had a good Title by the ſaid Will; and ſo gave Judgment for the Plaintiff: But a Writ of Error being brought in the Exchequer Chamber, this Judgment was by the Opinion of the two Chief Juſtices, reverſed; but by the Opinion of the Houſe of Lords, *Nemine contradicente*, this Reverſal was reverſed, and the Judgment of the Exchequer affirmed. Judgment for the Plaintiff in the Exchequer; reverſed in the Exchequer Chamber, but affirmed in the Houſe of Lords.

DE
Term. Sanct. Hill.
3 *Georgii* I.
In the EXCHEQUER.

Horſeman, qui tam, &c. verſus *Gibſon.*

Information grounded on the Stat. of 10 Q. *Anne*, prohibiting under a Penalty the Mooring of any Ships at the Queen's Moorings.

THIS was an Information againſt the Defendant, as Maſter of a Ship, upon the Statute 10th of Queen *Anne*, for the Penalty in that Statute for mooring his Ship, being a Merchant-man, at the King's Moorings.

Objection in Arreſt of Judgment.

There was a Verdict for the Plaintiff, and the Defendant mov'd in Arreſt of Judgment, That the Information was naught; for that it avers, that at the Time of the Mooring, the Defendant the Maſter, had the Care of the Ship; but does not aver that the Maſter was on board at the Time of mooring the ſaid Ship. It was urged, that this is required by the Words of the Statute, and ſo this Caſe is not brought either within the Words or Meaning of the Statute: Which muſt be, that he ſhould be then in the actual Exerciſe of his Duty, as Maſter, by his Preſence on board, and cited 1 *Sand.* 49. *Hardreſs* 217. That was an Information on the Act of Navigation, and it was not averred, that the Goods were not of the Growth of *Holland*, and held ill. And it was further ſaid, that the Act did not intend to puniſh any one who was not on board, and who perhaps knew nothing of the Matter: And here he could not; for he went aſhore before the Ship was moored. And it was further urged, that this was a penal Law, and ought to be expounded favour-

Penal Statutes are to be expounded favourably.

favourably, and it was hard for him to anſwer for the Fault and Offence of another; and if this was the true Conſtruction, then the Mate, or any other Perſon who had the actual Command of the Ship, would be anſwerable, as well as the Maſter; and ſo two Perſons would be anſwerable for the ſame Crime and Offence, which would be unreaſonable.

Argument for the Crown.

The Attorney General Sir *Edward Northey*, and others, argued to the contrary, that the Averments in the Information were proper and ſufficient; that it was laid in the Information, that the Maſter had the Care and Government of the Ship; that is, the immediate Care; for there cannot be two Perſons that have the immediate Care, but they muſt be in Subordination; and the Maſter will be anſwerable tho' not on board; for the Words of the Statute are in the Disjunctive, Captain, Maſter, or Perſon, having the Care or Command of ſuch Ship, that ſhall be then on board.

The Opinion of the Court for the Crown.

And the whole Court on taking Time to conſider of this Matter, was unanimouſly of Opinion, that it was a good Information, and that the Averments were ſufficient to bring it within the Statute. They held, that it was both within the Words and Meaning of the Statute; for that the Words in the Statute, *that ſhall be then on board*, muſt, in a grammatical Conſtruction, as well as in good Senſe, be referred to the Words, *Perſon having the Command of the Ship*, and not to *Captain* or *Maſter*; for that the Particle *or*, plainly disjoins the Subſtantives *Captain* and *Maſter*, from *Perſon having Care and Command at the Time of Mooring*, and cannot relate to the Captain or Maſter, becauſe he has always the Command of the Ship, as well when he is aſhore as on board; and therefore this Sentence muſt be read with the Word *other*; or other Perſon having Care or Command, *i. e.* the actual Care and Command of the Ship at the Mooring. The Words are, " If any Merchant's Ship ſhall " faſten to any of the King's Moorings, or fix themſelves " to any of the King's Ships or Hulls, the Captain, Ma- " ſter, Commander, or Perſon having the Care or Com- " mand of ſuch Ship, that ſhall be then on board, to for- " feit," *&c.* This Conſtruction is proper from the Pre-

amble, which recites the Miſchief, that the King's Ships were ſubject to fire, and the Moorings worn out; that by this Means there was an Opportunity of running Goods and imbezilling the King's Stores; and who is the Cauſe of all this? why the Maſter and the Perſon left on board: For 'tis recited, this happens thro' the Careleſsneſs of the Perſon left on board; therefore there ought to be a Remedy adequate to the Miſchief, which is to give the King an Election to puniſh the Maſter or Servant; the Maſter for not putting in a more careful Servant, and for leaving the Ship before ſhe was moored; and the Servant for his actual Breach of Duty, doing the Miſchief: The contrary Conſtruction would excuſe the Maſter quite, and releaſe him from Part of his Duty which the Law creates, that is, to ſee to his Moorings, and her Bed and Lying, and put the King to take his Remedy perhaps from a Cabbin-Boy or common Sailor who is actually on board. The Maſter is anſwerable at Common Law for the Negligence of his Servant; the whole Care and Charge of the Ship is committed to the Maſter, who is *Exercitor Navis*, he engages againſt every thing, except *Damnum fatale*, *i. e.* Pirates and Storms. As the Maſter may hypothecate for Neceſſity, ſo *econtra* he is anſwerable if ſhe periſh or be injured by his own or Seamens Negligence. *Hob.* 12.

The Maſter anſwerable for his Servant's Negligence.

Suppoſe this Ship had got from her Moorings, and fell foul of any other Ship, or broke her Back, tho' the Maſter were not on board at the Mooring, he would have been anſwerable; nay he is anſwerable, tho' no apparent Neglect either in him or his Servants and Seamen; becauſe of his expreſs Engagement to take Care of and conduct the Ship, and has Wages for it; and ſo is the Caſe of *Morſe* and *Slue*, 1 *Vent.* 238.

1 D'Anv. 12. pl. 6. 2 Lev. 69. 2 Keb. 866.

But it was objected, 'tis a penal Law and ſhall be taken by Equity. But tho' this be a Law in ſome ſort penal, yet it is a remedial Law, and beneficial for the Publick; and therefore ſhall have a free and benign Conſtruction, as is *Plowd.* 36. *b.* If a Statute be beneficial to very many, and puniſh but a few, thoſe are called gracious and beneficial Laws.

Anſwer to the Objection that it is a penal Statute.

The Action is given in the alternative to one or other, but not againſt both, as the Caſe of *Morſe* and *Slue*; where it was held, that an Action of Caſe for Goods loſt out of a Ship, would lie either againſt the Maſter of the Ship, or againſt the Owners. So Eſcape will lie againſt the Gaoler, and yet the Sheriff is liable, for *reſpondeat Superior.* 1 *Vent.* 239. but not againſt both, and a Recovery againſt one may be pleaded by the other; for, a double Satisfaction no Man ought to have for the ſame Thing.

But then there was an Objection to the finding of the Verdict, that the Jury had found more than was averred in the Information, or that was in the Iſſue; for, the Information doth not aver that the Defendant moored the Ship, but the Verdict finds it ſo. But it was over-ruled by the Court, for the Information is laid in the Words of the Statute, that the Ship was moored; ſo the Defendant being Maſter, by neceſſary Implication, the Maſter then did it, who had the Care and Command of the Ship; and if the Mooring is ſuppoſed to be done by him, then 'tis Part of the Iſſue. They find *quoad* the Mooring of the ſaid Ship by Defendant *Gibſon*, and lying there five Tides, Defendant is guilty; this had been all one and as good Senſe, as if *per Carolum Gibſon* had been left out, for 'tis not material who the Ship was moored by, ſince the Captain is liable, if he is guilty, as to Mooring and continuing five Tides, then he moored the Ship. *Morſe* and *Slue* is a ſtronger Caſe than this; the Declaration was, that the Maſter received Wages of the Merchant; and the Verdict was according to the Truth, that the Maſter received Wages of the Owner of the Ship, but it was held not material; for the Merchants pay the Owners, and the Owners pay it over to the Maſter. But this is not a Conſtruction according to the Equity of the Statute only, but it is a Caſe within the Words and Meaning of this Law, according to the moſt natural and proper Conſtruction; and penal Laws muſt be ſo conſtrued as well as others. And Baron *Forteſcue A.* remembered a Caſe between *Aylmer* and *Morris*, *Paſc.* 1 *Geo.* 1. determined by Lord *Parker* Chief Juſtice of the King's Bench at *Niſi prius* in *Middleſex*, which

Objection to the Verdict; more found than is in Iſſue;

over-ruled.

was

was an *Indebitatus Aſſumpſit* for 220 *l.* Money received to the Plaintiff's Uſe, as his Share of a Prize taken by the Defendant, the Plaintiff being Admiral and Flag-Officer, given by the Statute 6 *Ann. fol.* 277. which ſays, If any Ship be taken and condemned as Prize, the Flag-Officer, or Commander, and other Officers, Seamen and others, who ſhall be actually on board ſuch Ship which ſhall take ſuch Prize, ſhall have the ſole Intereſt of ſuch Prize in ſuch Proportion, as the Queen by her Proclamation ſhall think fit; and by the Queen's Proclamation, the Flag-Officer is to have one Third of the Captain's Share, who has for his Share three Eighths. The Lord *Parker*, now Earl of *Macclesfield*, held, that the Prize being taken under the Command of Admiral *Aylmer*, and under his Direction, tho' he was not actually on board nor in Sight, yet he ſhould have his Share. This is a ſtronger Caſe than ours, for thoſe Words are all in the Conjunctive, Flag-Officer and other Officers who ſhall be on board; and yet the *and* was conſtrued *or*, to make it agreeable to good Senſe and the true Meaning of the Law-makers, and within the Reaſon of the Common Law.

Objection as to two Penalties; anſwered.

Then it was objected, they may have two Remedies, and recover two Penalties for one and the ſame Offence. *Anſwer:* That cannot be, and is a Miſtake; for when the Recovery is againſt the Maſter, the Election is determined.

Judgment for the Crown.

So Judgment as before was finally given.

DE
Term. Paſch.
9 *Georgii* I.
In the KING'S BENCH.

The King verſus *Earbery.*

THE Defendant *Matthias Earbery* was a worthy honeſt Clergyman, and a good Divine, but was drawn in by ſome of his Party to write a Pamphlet, called *The Hiſtory of the Clemency of our* Engliſh *Monarchs*; in which the Miniſtry thought there were ſome ſcandalous Reflections upon the Government, he was therefore indicted for a ſcandalous Libel *againſt the Government*; and thereupon, for Want of Appearance, he was outlawed. Whereupon the Defendant giving Notice to the Attorney General, moved for a Writ of Error, which the Attorney General oppoſed, as not being allowed in the Caſe of the Crown, without the King's Leave.

A Writ of Error in all Caſes except Treaſon and Felony, is granted *ex debito Juſtitiæ.*

Anciently no Man could be outlawed but for Felony or Treaſon, and the Puniſhment was Death; he had, as the Law calls it, *Caput lupinum*, his Life being expoſed to every one he met. But ſome time after, Proceſs of Outlawry was ordered to lie in all Actions that were *Quare Vi & Armis*, which were called *Delicta*; for the King had a Fine: And ſince that, by divers Acts of Parliament, Outlawries lie, in Debt, Account, Caſe, and ſeveral other Caſes. By all theſe Outlawries he is *extra Legem poſitus*, forfeits the Profits of his Land, and all his Goods, and is diſabled to ſue; but this is only Proceſs to bring him in to anſwer the King's

Hiſtory of Outlawry.

Suit, and ſo it is of Excommunication. Plea of Outlawry does not abate the Writ, it is only in Diſability of the Perſon 'till he ſues out a Charter of Pardon. *Co. Litt.* 128. *b.*

Outlawries by what Means reverſible.

If one who is in Priſon ſhall be outlawed in Debt, Treſpaſs, or in Appeal of Robbery, he ſhall reverſe this Outlawry by Writ of Error; but when the Defendant comes in on the *Capias utlagatum*, then it is by Plea for Matters apparent in the Record; but for Matters of Fact, as Impriſonment, Death, *&c.* it is by Writ of Error, unleſs it be in Felony, and there he may plead, *in Favorem Vitæ*. *Co. Litt.* 259. *b.*

Severe Conſequences of refuſing a Writ of Error in this Caſe.

To refuſe the Defendant a Writ of Error in this Caſe, is a worſe Puniſhment than the Court would or could inflict for the Crime itſelf, becauſe of the Forfeitures of his Goods and Diſability of the Perſon, and muſt end in Impriſonment for Life; and if for a ſingle Treſpaſs, is a ſore Impriſonment. On *Scire facias* to repeal a Patent, whether the Party could bring a Writ of Error without Petition to the Crown was a Queſtion. But it ſeems to be agreed, that an Outlawry may be reverſed in ſome Caſes, without ſuing by Petition to the Crown. 3 *Leon.* 160. 2 *Leon.* 194, 244. Many Outlawries have been reverſed by Writ of Error, and yet in ſuch Caſes the King has an immediate Intereſt.

Stat. 4 & 5 W. & M. c. 18.

4th and 5th *William* and *Mary*, *cap.* 11. recites Outlawries in the King's Bench for Debt, Treſpaſs, and other Miſdemeanors; and that ſuch cannot be reverſed but by the perſonal Appearance of the Party; whereby, if it be a poor Man, and he dies in Priſon, he is very unfortunate; and if able and living, it is very chargeable to reverſe ſuch Outlawry. This Act ſays, *for the more eaſy reverſing Outlawries*; and provides, that no Perſon outlawed in the ſaid Court of King's Bench, for any Cauſe (except Treaſon or Felony) ſhall be compelled to appear in Perſon to reverſe, but may do it by Attorney, and reverſe the Outlawry in all Caſes without Bail (except where ſpecial Bail is ordered by the Court.) *King* verſus *Macartny*, *Trin.* 2 *Geo.* 1. the Defendant was outlawed for the Murder of Duke *Hamilton*; and

it was referred to the Attorney General, who made his Report, that a Writ of Error was never denied if the Witneſſes were living. The Writ allowed on Outlawry for Murder, the Witneſſes being alive.

One outlawed for a Miſdemeanor, and fined 5000 *l.* and the Court held the Fine was naught; becauſe in a Miſdemeanor, the Outlawry does not work as a Conviction for the Offence, as it does in Treaſon and Felony, but as a Conviction of the Contempt for not anſwering, which Contempt is puniſhed by the Forfeiture of his Goods and Chattels; and if he be fined now, he muſt be fined again on the principal Judgment. Effect of Outlawry for a Miſdemeanor.

That an Outlawry is no Conviction in Miſdemeanors, ſee *Fleta* 42. *Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus eſt de facto principali. King* verſus *Tipping*, 1 *W. & M. Salk.* 494. It is not a Conviction.

'Tis a great Charge to reverſe an Outlawry in the King's Bench, becauſe the Defendant muſt appear in Perſon, but he need not in the Common Pleas, but may appear by Attorney. If the Attorney General confeſs the Error, Defendant ſhall plead preſently, and be tried on the Indictment. Different Courſe in *B. R.* and *C. B.*

In perſonal Actions, tho' for 10000 *l.* if a Perſon be outlawed for the ſame, and if the Defendant appears at the Return of the Exigent, he may reverſe the Outlawry without putting in Bail; and tho' Defendant be at Liberty and bailed, yet ſtill 'tis a Puniſhment, *i. e.* Forfeiture of Lands and Goods. *The Queen* verſus *Leighton*, was on a Conviction of forcible Detainer, and the Defendant was fined 100 *l.* a Writ of Error was brought, but the Court would not bail the Defendant, but agreed *per Cur'* that on a Writ of Error to reverſe an Outlawry the Court will take Bail, but not to reverſe a Judgment. In an Indictment, *Paſch.* 4 *Ann.* the Court refuſed to bail the Defendant being in Execution. Suppoſe this were the common Caſe of an Indictment for a Battery, and the Defendant outlawed for the ſame, would not that be juſt the ſame Caſe as on an Outlawry In perſonal Actions. 1 Salk. 106, 353, 459. 1 Salk. 106.

lawry in a Civil Action, you cannot fine him or puniſh him for Contempt; for on the Outlawry he is diſabled and forfeits; and if a Writ of Error be refuſed, he muſt be kept in Priſon all his Life long, for a Contempt only for not appearing. And indeed this is in the Nature of a Civil Action, being only for a Miſdemeanor. If a Man be outlawed in Battery, is he to remain in Gaol for ever at the King's Will and Pleaſure? To have a Writ of Error in Felony or Treaſon is inconvenient and unjuſt, becauſe of the great Forfeitures to the ſeveral Lords, and to the Crown; but in Miſdemeanors no Inconvenience, an Action will lie for a Libel, and ſo will an Indictment.

Reaſons againſt Error in Treaſon and Felony.

The Attorney General at another Day, moved this Matter again; and Chief Juſtice *Prat* and *Powis* ſeem'd to think, that the Defendant in Diſcretion ought not to be bailed; but Juſtice *Eyre* and *Forteſcue A.* were clear of Opinion, this was a Caſe within the Act of Parliament for Reverſal of Outlawries, and therefore he ought to be bailed. For altho' in the Preamble 'tis ſaid where the Proceedings to the Outlawry are in the King's Bench, yet in the Purview and in two or three Clauſes 'tis ſaid only, Outlawries in the King's Bench, and this is now an Outlawry in the King's Bench, being removed hither by *Certiorari*; for now 'tis a Record; and 'till it appears on Record, Lord *Coke* ſays expreſsly, it has no Effect as to Forfeiture, and here it firſt appears on Record and no where elſe; ſo they thought it was within the expreſs Meaning and Intention of the Act to bail him. And *Eyre* and *Forteſcue A.* quoted 2 *Salk.* 504. that it was the Reſolution of all the Judges of *England*, except Judge *Price* and Judge *Smith*, that the Queen could not deny a Writ of Error, but that it was grantable *ex debito Juſtitiæ* (except in Treaſon and Felony); and the true Reaſon why one outlawed for Treaſon or Felony, can't have a Writ of Error, without the King's Leave, is becauſe it is a Conviction; and then he has forfeited all he has to the Crown. Upon this the whole Court thought it reaſonable and juſt that he ſhould have a Writ of Error; and thereupon the Attorney General did immediately ſign a Warrant for a Writ of Error, and did conſent to his being bailed to appear accordingly. This was moved three or four times.

Vide 2 Lev. *Thurſton's* Caſe.

Outlawry is a Conviction in Treaſon and Felony.

The Writ granted in this Caſe.

DE
Term. Sanct. Mich.
12 *Georgii* I.
In the KING'S BENCH.

The Duke of Somerſet verſus *France and other Tenants in Cumberland.*

THIS was a Trial at the King's Bench Bar, on a ſpecial Iſſue directed, to try the Cuſtom of ſeveral Manors of the Duke of *Somerſet* in *Cumberland*, *i. e.* whether he was entitled to a general Fine, as his Ducheſs was when ſhe was living. Theſe were Tenant-Right Eſtates in *Cumberland*; and it was agreed, this Cuſtom extends only to three northern Counties; *i. e. Cumberland*, *Weſtmoreland* and *Northumberland*. The firſt Queſtion was upon the Evidence; for, my Lord Duke's Counſel were forced to make uſe of the Evidence of other Manors in the ſame Counties that had this Cuſtom; for it was clearly agreed, that Evidence of a Cuſtom in one Manor, could not be, nor ever was allowed to prove a Cuſtom in another. But upon the Authority of that Caſe in 3 *Keble* 90. and upon what the Counſel who went the northern Circuit (one of whom was Mr. *Lutwych*) ſaid, that it had been conſtantly allowed in thoſe three Counties; the Court did unanimouſly agree to it; but the particular Reaſon Juſtice *Forteſcue A.* gave, was, that theſe Manors and Counties anciently made one Earldom, and conſequently belonged to one Earl; for there were Earldoms long before the Conqueſt, and all theſe three Counties were anciently in the Hands of the Earl of *Northumberland*; and ſo in all Probability there came to be the ſame Cuſtoms in each

A Trial at Bar to prove the Cuſtom of a Tenant-Right Eſtate where there is a general Fine on the Death of the Lord in the three northern Counties.

The Cuſtom of other Manors in the ſame Counties allowed as Evidence; why?

Manor. That Caſe in 3 *Keb.* 90. was a Caſe of a Cuſtom in one of thoſe Manors; in this Caſe of Tenant-Right Eſtates, it was an Iſſue to try the Cuſtom of Lady *Piercy*'s Manor of *Weſtwood* in *Cumberland*, whether a Fine on the Death of a Lord who is an Infant be due, agreeing that if it were a dropping Fine it is due to the Lord, whether of Age or not, but the latter only to Lords of full Age; and if he die before Age as the Earl of *Northumberland* her Father did, it is gone; and the Admiſſion is for the joint Lives of Lord and Tenant, ſo on the Lord's Death the Eſtate of the Tenant is gone 'till a new Admittance; but the Tenants are never diſturbed in their Poſſeſſion: and it was here admitted and agreed as to theſe Tenant-Right Eſtates, that the Cuſtom is, that their Admiſſion is to hold for the joint Lives of Lord and Tenant; that upon the Lord's Death the Eſtate of all the Tenants is gone, and this Admiſſion is made at a general Court of Dimiſſions, held in the Manor for that Purpoſe; and it is *ad Voluntatem Domini ſecundum Conſuetudinem Manerii:* The Admittance takes Notice that one comes and takes from the Lord, *modo in Manibus Domini dimittend.* and this is Part of the Profits of the Lord's Eſtate. Admittances during the Ducheſs's Life, were during the joint Lives of the Ducheſs and the Tenants. *Joceline* Earl of *Northumberland* died about the year 1670. and then the Lady Ducheſs was entitled. The Ducheſs had it for her Life, for her Jointure, in Marriage with the Duke, and ſhe was the Daughter of *Joceline* Earl of *Northumberland*; and after that it was limited to the Duke for his Life, who is intitled to all theſe Fines. *Note*; it was agreed that a Cuſtom that a Copyholder ſhall upon the Change of every Lord, pay a Fine, is a void Cuſtom; for, the Lord may change his Manor every Day; reſolved by the Judges in Serjeant Inn, in the Caſe of one *Armſtrong*. If a Fine be due by Alteration of the Lord, it muſt be by the Act of God, and not by his own Act; otherwiſe the Copyholders would be greatly oppreſs'd by the Lord's own Act: But where the Change grows by the Act of God, the Cuſtom is good, as by Death. *Co. Litt.* 59. *b. econtra*, by Alteration of the Tenant's Eſtate, either by his own Act, or Act of God. This Tenant-Right, is a Right of Reemption or Redemption after the Eſtate is gone. *Note*;

Poſt p. 44, 45, &c.

Cuſtom to pay Fine on Change of Lord, ill.

Otherwiſe if Tenant alters the Eſtate.

Tenant's Right, what?

Greſham was wrote in the Margin of the Court-Rolls of moſt Admittances. Now the Word *Greſham* comes from the *Saxon* Word Gærſuma, *Gærſuma*; which ſignifies *Præmium*, *Compenſatio*, and is a Law Term, uſed in the Forms of Sale, *pro tot libris in Gerſumam olim, præ manibus, hodie ſolutis vel traditis*; ſo much Money in Hand paid. *Somner's Dictionary. Spelman* 263. 3 *Keb.* 90. The Jury brought in their Verdict in a Quarter of an Hour, and it was ſatisfactory to the whole Court, who ſaid it was a very clear Caſe.

Greſham, what?

Its Etymology

Note; Thoſe who had a Manor and Tenant-Right Eſtate were rejected as no Evidence. But agreed by the Court this was a good Cuſtom, tho' the Lord be but Tenant for Life or Tenant by the Curteſy.

They who had like Eſtates not good Witneſſes.

Note alſo, that an Admiſſion under the Hand of the Steward, though above forty Years old, was rejected in Evidence, becauſe they could not prove the Steward's Hand.

Proof of Hand-writing required tho' above forty Years ago.

DE
Term. Sanct. Trin.
7 *Georgii* II.
In CHANCERY.

Robert Lowther, Eſq; Plaintiff, verſus *Michael Raw, John Wilſon, Robert Hornby, Henry Salkeld, William Wharton, Thomas Wharton, and others, Tenants of ſeveral Manors in the County of Weſtmoreland, Defendants.*

The Cuſtom of a Tenant-Right Eſtate in the County of *Weſtmoreland* during the joint Lives of Lord and Tenants eſtabliſhed by Decree in Chancery.

WITHIN the ſeveral cuſtomary Manors of *Kirby-Steven*, *Wharton*, *Nateby*, *Shap*, *Tebay*, *Langdale*, *Bretherdale*, *Reagill*, *Sleagill*, *Longmarton*, and *Brampton-Carhullan*, in the County of *Weſtmoreland*, (which was the Eſtate of the late Duke of *Wharton* and his Anceſtors) there are and have been Time immemorial ſeveral cuſtomary Meſſuages, Lands and Tenements reſpectively holden thereof, as Tenant-Right or cuſtomary Eſtates of Inheritance, deſcendible from Anceſtor to Heir, according to the ancient and laudable Cuſtom of Tenant-Right.

The Cuſtom.

By the ſaid Tenure all ſuch cuſtomary or Tenant-Right Eſtates of Inheritance within the Counties of *Cumberland* and *Weſtmoreland* (which now are not, or which were not originally veſted in the Crown, Church, or other Bodies Politick) do determine and fall to the Lord for the Time being in the legal Poſſeſſion of the reſpective cuſtomary Manors under which they are held, on the Death of the laſt precedent

general admitting Lord thereof, whether he died in or out of Poſſeſſion; and not on the Change by Death of any non-admitting Lord, nor of any minor Lord, nor of any Lord or Lords thereof who had only admitted on the Death, Alienation, or Surrender of the Tenants: For, all ſuch caſual or particular Admittance to the Heirs, Aſſigns or Succeſſors of the Tenants, as had all their Eſtates re-granted to them on the Death of the laſt general admitting Lord, are only conſidered (with regard to the Death of the Lord) as a Continuation of the Grant which was ſo made to the then reſpective Owners of their ſaid cuſtomary Eſtates by the laſt general admitting Lord of the Manor.

All the ſaid cuſtomary Tenants, upon every ſuch Determination of their ſaid general Grants, are intitled by the ſaid Tenure to be all re-admitted to their Eſtates, and to have new Grants thereof from the Lord in the legal Poſſeſſion of the Manor, if he be not a Minor (for ſuch Lord cannot re-grant during his Minority, though he may admit the Tenants, as aforeſaid, on Deſcents, Alienations, or Surrenders) on their appearing upon reaſonable Notice at the next cuſtomary Court of Dimiſſions that is holden for ſuch Manor, and on their reſpectively paying to the Lord, for ſuch general new Grants, the Fine or *Greſſom* (Ἐκπρυμα) as ſhall be aſſeſſed upon them, provided (if it be an arbitrary Fine) that it do not exceed two Years improved Value of each Tenant's Eſtate. Ante p. 41, 42.

The arbitrary Fines are ſo called from its being in the Power of the Lord, on all the aforeſaid Contingencies, not only to aſſeſs any Sum (for a Fine) he thinks fit, that does not amount to above two Years improved Value of each Tenant's Eſtate, but alſo to appoint both the Manner and Time of the Payment of the Fines ſo aſſeſſed. Arbitrary Fines limited.

The Fines or *Greſſoms* ſo aſſeſſed on all the Tenants of the Manor upon the Death of every laſt general admitting Lord, are called General Fines; and thoſe ſo particularly aſſeſſed on the Change of the Tenants by Death, or on the General and Dropping Fines.

Alienation or Surrender of their Eſtates, are called Dropping Fines.

All the ſaid General and Dropping Fines ariſing out of the ſaid cuſtomary Eſtates on all the aforeſaid Occaſions, have always been paid to the Lord in the legal Poſſeſſion of the Manor who aſſeſſed them, (as alſo the yearly Rents, Boons and Services iſſuing or belonging to the ſaid Eſtates) whether he become intitled thereto by Deſcent, Deviſe, Purchaſe, or as Tenant for Life, created ſo by Marriage or other Settlement.

As all the ſaid Fines or *Greſſoms* were not only inſtituted by the ſaid Tenure, but likewiſe the ſaid Occaſions, on which they are only liable to be aſſeſſed; and as the ſaid cuſtomary Eſtates, belonging to the Tenant, only ſubſiſt and are held by them on the Payment of the ſaid Fines, aſſeſſed upon them on the ſaid Occaſions; ſo it is not in the Power of any Lord to vary or alter, by his ſaid general Grants or particular Admittances, any of the ſaid Contingencies on which the ſaid Fines do ariſe; for every Limitation of the Tenant's Eſtate, either in his general Grants or particular Admittances, that is contrary thereto, is void.

Lord cannot alter the Contingencies.

All the ſaid general and dropping Fines, ſo ariſing out of the cuſtomary Eſtates held under the reſpective cuſtomary Manors above-named, were formerly uncertain or arbitrary Fines, at the Will of the Lord, both as to the *Quantums*, the Manner, the Rates or Proportions, and Days of Payment.

But for avoiding the Diſputes which had frequently happened with the Tenants, touching the *Quantum*, or the reaſonable Aſſeſſment of the ſaid arbitrary Fines on all the aforementioned Occaſions, or (in other Words) for preventing the Differences which had frequently happened between the Lords and Tenants concerning the annual Value of the Lands on which the arbitrary Fines, both general and dropping, were aſſeſſed; and for fixing the Days, and the Manner, and the Rates or Proportions of the Payment of the

The arbitrary Fines have been ſettled by Deeds.

ſaid Fines after they ſo aroſe, ten ſeveral Indentures of Agreement were entered into, by which moſt of the general and dropping Fines within the ſaid Manors of *Tebay*, *Langdale* and *Bretherdale* were reduced from being arbitrary or uncertain Fines, to ſuch a certain Sum as only amounts to eight times one Year's Lord's Rent, which each Tenant annually pays for his ſaid Lands or Tenements. And by ſeven other Indentures, moſt of the ſaid arbitrary Fines in the ſaid Manors of *Kirby-Steven*, *Wharton*, *Nateby*, *Reagill*, *Sleagill*, *Long-Marton*, *Shap* and *Bampton-Carhullan*, were in like Manner reduced to pay ſuch a Sum for a Fine as only amounts to ten times one Year's Lord's Rent.

The ſaid ten ſeveral Indentures were made in the Months of *Auguſt* and *September* in the Year 1613, between *Philip* Lord *Wharton* and Sir *Thomas Wharton* his Son, they, or one of them being Lord or Lords of the ſaid Manors, and ſeveral of the Tenants of the ſaid cuſtomary Eſtates then and now holden of the ſaid reſpective Manors, and were all to the ſame Effect, *mutatis mutandis*; in which it is recited, That the ſaid Tenants that were Parties thereto, did ſeverally hold their ſaid Tenements of the ſaid Lord *Wharton* and Sir *Thomas Wharton*, or one of them, and of their Anceſtors, Lords of the ſaid Manors for the Time being, by and according to the Cuſtom of Tenant-Right there uſed Time out of Mind of Man within the ſaid Manor, by Payment of certain annual Rents, Suit of Court, and Boons for the ſame, uſual and accuſtomed; and by paying upon the Death of the Lord only, and Change of the Tenant by Death or Alienation, ſuch reaſonable Fine arbitrary and uncertain, as between Lord and Tenants for the Time being ſhould or might be compounded for and agreed upon reaſonably. The Subſtance of the Deeds.

The Cauſes and Conſiderations for making the ſaid Indentures, are declared and recited to be for certain Sums of Money therein mentioned; and in Conſideration of the honourable Care and ſpecial Favour which they the ſaid *Philip* Lord *Wharton* and Sir *Thomas Wharton* bore to the ſaid Tenants; and for the better to ratify, eſtabliſh and confirm for ever their cuſtomary Eſtates to them, their Heirs and Aſ-

ſigns,

ſigns, according to the Cuſtom of Tenant-Right, during all the Time of the Memory of Man thentofore uſed, and in all Points as had been accuſtomed, without any Violation or Alteration thereof; ſaving only that the Fines and *Greſſoms* might from thenceforth become certain and known, for avoiding of Suits which might afterwards enſue.

It is likewiſe declared by the ſaid Deeds, That the ſaid Meſſuages ſo charged with the Annual Rents then were, and for the Time whereof the Memory of Man was not to the contrary, had been, and for ever afterwards ſhould be reputed, judged and taken to be cuſtomary Lands and Hereditaments of Inheritance, of, and according to the Nature of the antient and laudable Cuſtom of Tenant-Right.

And the ſaid *Philip* Lord *Wharton* and Sir *Thomas Wharton* did thereby covenant, grant and agree, to and with the ſaid Parties, and their ſeveral Heirs and Aſſigns, that they ſhall hold their ſaid Eſtates, according to the antient and laudable Cuſtom of Tenant-Right, and that alſo in every Point, according to the Cuſtom thentofore uſed, by paying the Rents and doing the Services, as thentofore, ſave only for the Manner of the Payment of the Fine, or *Greſſom*, as thereafter enſueth; any Thing in theſe Preſents, or otherwiſe, to the contrary, notwithſtanding.

And they, the ſaid Lord *Wharton* and Sir *Thomas Wharton*, did further covenant with the ſaid Parties, that neither of them, nor neither of their Heirs or Aſſigns, nor any of them, ſhall not at any Time or Times, thereafter, claim, demand, or have any other, more or greater Fine, or Fines, or *Greſſoms*, of the ſaid Parties, to the ſaid Indentures, their, or any of their Heirs or Aſſigns, than eight Times one Year's Lord's Rent, for the Lands in the Manors of *Tebay*, *Langdale* and *Bretherdale*; and ten Times one Year's Lord's Rent, for the Lands in the ſaid other Manors, upon the Change of the Lord for the Time being, by Death only, and upon Change of the Tenant for the Time being, by Death or Alienation.

And the ſaid Tenants Parties thereto reſpectively covenant, for themſelves, their Heirs and Aſſigns, to pay their ſaid Fines to the ſaid *Philip* Lord *Wharton* and Sir *Thomas Wharton*, their Heirs and Aſſigns for the Time being Lords of the ſaid Manors reſpectively, as the ſame ſhall reſpectively happen to grow due, in Manner and Form following, that is to ſay, at and upon ſuch two Yearly Feaſt-Days of St. *Martin* the Biſhop in Winter, and *Pentecoſt*, by even and equal Portions, as ſhould from Time to Time ſucceſſively next happen from and after the ſame Fine and *Greſſom* ſhall grow due and payable, by the true Meaning of the ſaid Indentures, by or by Reaſon of the Death of the Lord of the Premiſſes, and by or by Reaſon of the Death of the Tenant for the Time being, or of the Alienation for the Time happening.

The ſaid Indentures, by Conſent of all Parties, were confirmed by ſeveral Decrees in the Court of Chancery, in *Hilary* Term 1613. The Deeds confirmed by Decrees in Chancery.

The ſaid Manors, by ſeveral Deſcents, came to *Thomas* late Marquis of *Wharton*, on the Death of his Father, *Philip* Lord *Wharton*.

The ſaid Marquis re-admitted all the Tenants of the ſaid Manors to their Eſtates, on the Death of his ſaid Father, and thereupon aſſeſſed and received a general Fine from all the ſaid Tenants, for ſuch new Grants or Re-admiſſions.

The ſaid Marquis died in the Year 1715, and the ſaid Manors deſcended to his Son *Philip*, a Minor, (afterwards created Duke of *Wharton*) who, ſoon after his Father's Death, re-admitted all the Tenants of the ſaid Manors to their Eſtates, and thereupon aſſeſſed a general Fine upon all the Tenants of the ſaid Manors, for ſuch new Grants or Re-admiſſions, and appointed it to be paid, according to the Times, Manner and Proportions, which are prefixed by the ſaid Indentures; but the ſaid Tenants refuſed to accept of his ſaid Grants, inſiſting, that by the Cuſtom no general Fine could

be aſſeſſed by an Infant Lord, and that the Indenture intended no Variation of the Cuſtom.

In the Year 1720, the ſaid Duke (being then of Age) did again re-admit all the Tenants of the ſaid Manors to their Eſtates, and aſſeſſed a general Fine upon all the ſaid Tenants, upon which they all accepted of the ſaid general Grants or Re-admiſſions, and thereupon paid their Fines ſo aſſeſſed.

The ſaid Duke being ſo ſeiſed of the ſaid Manors, and having Occaſion to raiſe Money for the Payment of his Debts, *&c.* did (*inter alia*) veſt the above-mentioned Manors in Mr. Juſtice *Denton*, *Thomas Gibſon*, *John Jacob*, and *Robert Jacomb*, Eſquires, his Truſtees, in order to be ſold for the Payment of his Debts.

The Creditors afterwards exhibited their Bill in Equity, againſt the Truſtees, to compel an Execution of the Truſt, and accordingly it was decreed, that the ſaid Truſt-Eſtate ſhould be ſold before a Maſter, for Payment of Debts.

Sale of the Manors to the Plaintiff.

In purſuance of the ſaid Decree, the Plaintiff was reported and confirmed the beſt Bidder.

In the Year 1729, the ſaid Truſtees for 30400 *l.* conveyed the Fee and Inheritance of the ſaid Manors, with ſome other Eſtates, to the Plaintiff, who thereby became intitled to all Rents, Fines, Boons and Services, due from the ſaid Tenants of the ſaid Manors.

Admiſſions on dropping Fines after the Sale.

As it was underſtood, both by the Plaintiff and the Tenants, as a Matter without any Doubt, that their reſpective Eſtates were held, during the Life of the late Duke of *Wharton*, and would determine upon his Death. So, as any Tenants came in, upon dropping Fines by Deſcent or Alienation, they were admitted by the Plaintiff, to hold their ſaid Eſtates during the joint Lives of the ſaid Duke (as laſt general admitting Lord) and the Tenant ſo admitted, but none of them to hold during the Plaintiff's Life; and among many

others, the Defendants *John Wilſon*, *William Whinfield* and *John Robinſon*, themſelves, who came in upon the dropping Fines, were admitted in that Manner. They all accepted of their ſaid Admittances, and paid their Fines. And the Defendants *Whinfield*, *Winter*, *Bellas*, and great Numbers of the other Tenants, have declared that no general Fine would be due, ſo long as the Duke of *Wharton*, the laſt general admitting Lord, lived.

Declaration of divers Tenants now ſome of the Defendants.

The ſaid Duke died in *Spain* the 6th of *June* 1731. The Plaintiff conceiving that he thereby became intitled to a general Fine from the Defendants, and all the reſt of the Tenants of the ſaid Manors, as well thoſe included in the ſaid Indentures of 1613, as from thoſe that ſtill remain arbitrary, he therefore in *November* 1731. held cuſtomary Courts of Dimiſſions, and re-admitted the Defendants and all the reſt of the ſaid cuſtomary Tenants, aſſeſſed their general Fines, and tendered them new Grants or Re-admiſſions to their Eſtates ſo determined, as in ſuch Caſes is uſual.

The Defendants *John Robinſon*, *Robert Atkinſon*, *Thomas Wharton* and *William Wharton*, (who remain arbitrary Tenants to ſome Tenements) and all the other cuſtomary Tenants, not reduced to a Fine certain, paid their general arbitrary Fine ſo aſſeſſed, as did alſo a great Number of the Fine certain or Indenture Tenants, amounting in the whole to the Sum of 400*l.* But, the Defendants refuſed to pay the ſaid general Fine certain ſo aſſeſſed upon them, and entered into Articles of Combination with above five hundred of the Indenture Tenants, to obſtruct and oppoſe the Payment thereof; ſo the Plaintiff, to avoid Multiplicity of Actions at Law, to perpetuate his Evidence concerning the Duke's Death, to preſerve the Teſtimony of Witneſſes touching the Facts above ſtated, and other Points relating to his ſaid Claim, and to recover the ſaid general Fines ſo refuſed to be paid, exhibited his Bill in the Court of Chancery in *Hillary* Term 1732-3. againſt the Defendants, Tenants of the reſpective Manors aforeſaid, in which he ſet forth the Nature of the ancient and laudable Cuſtom of Tenant-Right, the ſaid Indentures of 1613, his Title to the

The End of the Plaintiff's Bill.

ſaid

ſaid Manors and his Pretenſions *(ut ſupra)* to the ſaid general Fine, and charged *inter alia*,

The Charge as to the Cuſtom.

That though one cuſtomary Manor may differ from another in ſome particular Cuſtoms, as to Boons, Duties and Services; yet in all cuſtomary Manors in the Counties of *Cumberland* and *Weſtmoreland*, where general Fines are paid, there always was and is a general Fine due and payable to the Lord for the Time being on the Death of the laſt general admitting Lord of the Manor, whether he did or did not die ſeiſed or poſſeſſed of the Manor, and whether the ſucceeding Lord thereof came into the Poſſeſſion of ſuch Manor by Deſcent, Purchaſe, or other Settlement.

And that the ſaid Cuſtom, in relation to the Occaſion on which the ſaid general Fines do ariſe, is not varied or altered by the ſaid Indentures of 1613.

The Plaintiff expreſsly waved by his Bill, all Benefit or Claim of Forfeiture againſt the Defendants, on their cuſtomary Eſtates, for, or in reſpect of their having refuſed to pay the ſaid Fines ſo aſſeſſed, and only prayed, that they and all the other cuſtomary Tenants of the ſaid Manors, might be decreed to pay the ſaid Fines ſo aſſeſſed upon them, together with Intereſt for the ſame from the Time they ought to have paid them.

Anſwer of the Defendants.

The ſaid Defendants put in their joint and ſeveral Anſwers to the ſaid Bill in *Eaſter* Term 1733, in which they put the Plaintiff on making ſuch Proof of his Title to the ſaid Manors, and of the Death of the late Duke of *Wharton*, as he can by Law. They inſiſt, that the Cuſtom of the ſaid Manors (antecedent to the ſaid Indentures) was, that all general, arbitrary or uncertain Fines were payable to the ſucceeding Lord, on the Death of the Lord in Poſſeſſion for the Time being only, and never payable to the Lord in Poſſeſſion, on the Death of the laſt general admitting Lord; but that however the Cuſtoms of the ſeveral Manors might have been before theſe Indentures, yet they ſay, as it now ſtands on the Foot of the Agreement in the ſaid Indentures,

it is made plain and clear, that the ſaid general Fines are now payable on the Death of the Lord for the Time being only.

They admit, that ſeveral of the Tenants of the ſeveral Manors in the Bill, did, on or about the ſecond Day of *November* 1731. enter into mutual Agreements in Writing, to ſtand by and aſſiſt each other, and to advance and pay their reſpective Proportions, towards Defending any Action or Suit as ſhould be brought againſt them by the Plaintiff, for Recovery of the ſaid general Fines. The ſaid Anſwer being reply'd to, the ſaid Cauſe was at Iſſue; and after the Examination of many Witneſſes, Publication paſſed *Trinity* Term 1733.

As to the general Charge in the Bill, touching the original Occaſion on which general Fines do ariſe by the antient and laudable Cuſtom of Tenant-Right, and to whom they become due and are payable, after they have ſo aroſe or accrued, in all the cuſtomary Manors in the Counties of *Cumberland* and *Weſtmoreland*, where general Fines are paid; it is fully proved by eighteen Gentlemen of the ſaid Counties, ſixteen of whom were bred to the Law, and well ſkilled in the Knowledge of the Nature and Practice of cuſtomary Manors in the ſaid Counties, *viz. Cumberland*, *Weſtmoreland* and *Northumberland*, That after the Death of the laſt general admitting Lord or Lords of any cuſtomary Manor, a general Fine becomes due and payable from all and every the cuſtomary Tenants of the Manor, to the next ſucceeding Lord, whether he come in by Deſcent or Purchaſe, or whether ſuch laſt general admitting Lord was at the Time of his Death, in or out of Poſſeſſion of the Manor, he being conſidered as Lord during his Life, with reſpect to the Continuance of the Tenants Eſtates. Proofs for the Plaintiff.

As to the Cuſtom and Uſage of the Plaintiff's ſaid Manors, it is likewiſe proved by ſeveral Witneſſes, that a general Fine is due and hath been paid for many Years laſt paſt to the ſucceeding Lord, on the Death of the laſt general admitting Lord; and the Witneſſes who ſpeak thereto, ſay, that they apprehend there is no Difference, whether ſuch ſucceeding Lord came in by Deſcent or Purchaſe.

It is alſo proved, that all the Tenants of the ſaid Manors refuſed to pay the general Fine that was aſſeſſed upon them in the Year 1716, on the Death of *Thomas* Marquis of *Wharton*, by the late Duke his Son; and that they inſiſted, that by the Cuſtom, no general Fine could be aſſeſſed by an Infant-Lord; and that the Indentures of 1613, intended no Variation of the Cuſtom; and that thereupon the ſaid Duke, in the Year 1720, after he came of Age, did again aſſeſs a general Fine upon them, on the Death of his ſaid Father; and that then they all accepted of his ſaid general Grants, and paid their ſaid Fines ſo aſſeſſed.

Though from the long Continuance of the ſaid Manors in the *Wharton* Family, no Inſtance can be given of any general Fines that were paid before the ſaid Family became ſeiſed thereof, yet as the Defendants are expreſsly declared by the ſaid Indentures to hold their Eſtates according to the antient and laudable Cuſtom of Tenant-Right; and as it hath been the common Uſage and Practice in all Caſes within the ſaid Counties, to admit the general Cuſtom of the Country to be given in Evidence, upon all Diſputes which have happened in any cuſtomary Manors, concerning the Payment of general arbitrary Fines;

So the Plaintiff alſo examined ſeveral Witneſſes, touching the Payment thereof, to purchaſing Lords in other cuſtomary Manors, where the Fines were reduced by Indentures of Agreement of the ſame Nature with the ten before-mentioned, from an arbitrary to a Fine certain; and in which there are the ſame Covenants and Agreements on the Parts of the Lords and Tenants, and likewiſe made Exhibits of the ſaid Indentures, and the Admittances and other Papers relating thereto, which are all ſpecified in the *Appendix*; whereby and other Proofs in the Cauſe it appears, the ſaid ſeveral Tenants have conſtantly ever ſince paid general Fines without Scruple, upon the Death of the laſt general admitting Lord, tho' he did not die poſſeſſed of, or intitled to the Manor, it being well known and underſtood that ſuch Lord, and no other, was meant to be the Lord for the Time being, mention'd in the Indentures.

Poſt p. 56, 57.

This Cauſe came on to be heard before the Right Honourable the Lord *Talbot*, Lord High Chancellor of *Great Britain*, on the 17th Day of *June* 1734, when his Lordſhip was pleaſed to determine, That the ſaid laſt mentioned Indentures, and Admittances made purſuant thereto, and the Judgment in Mr. *Relfe*'s Caſe ought not to be read as Evidence in the Cauſe, and was likewiſe pleaſed to diſmiſs the Plaintiff's Bill, but without Coſts. The Plaintiff apprehending himſelf aggrieved by the ſaid Diſmiſſion, and by not having the ſaid Exhibits either read in the Cauſe, or entred as read, did appeal to the Houſe of Lords in *April* 1735. The principal Foundation and Reaſon of the Appeal was the laſt Caſe of the Duke of *Somerſet*, and if his Lordſhip had been ſo provident as to call the Chief Juſtice of *King's Bench*, Lord *Hardwicke*, which was uſual, to his Aſſiſtance, he would have been inform'd fully of that Caſe, and all the Reaſons for eſtabliſhing the Law concerning Tenant-Right Eſtates, which are no where to be found but in thoſe three Counties, where the Evidence of this Cuſtom in one of thoſe, is Evidence in any other of the Three; and in the Houſe of Lords, the Chief Juſtice ſpoke largely for the Reverſal, and ſo did the Right Honourable the Lord *Carteret*, now Earl *Granvil*, and open'd fully the Nature of the Caſe, and the proper Meaning of *Greſſom* Fines, from the *Saxon* Gæpruma, *Gærſuma* Money in Hand, and quoted the Duke of *Somerſet*'s Caſe; whereupon the Lords did reverſe the Decree unanimouſly.

Hearing before Lord *Talbot*, Chancellor.

Bill diſmiſſed without Coſts.

Appeal to Houſe of Lords.

The Decree reverſed.

And it was declared, that the Appellant was intitled to general Fines from all the Tenants, upon the Death of *Philip* late Duke of *Wharton*, according to the Rate ſpecified in the Indenture between the ſaid Lord *Wharton* and the Tenants in the Year 1613, and to be referred to the Maſter to inquire if the Fines have been aſſeſſed rightly, and if not, to aſſeſs the ſame, and then to be paid to the Appellant.

APPENDIX.

The Appendix to the foregoing Caſe, *Lawſon*'s Caſe.

Anthony Patrickſon ſold this Manor to *Gilfred Lawſon*, Eſq; who upon *Patrickſon*'s Death aſſeſſed and received a general Fine. By the Admittances from Mr. *Lawſon* to the Tenants (and proved in the Cauſe) their Eſtates are ſaid to be then in the Lord, and to be re-granted on paying the Fine.

Lamplugh's Caſe.

Richard Barwis, Eſq; Lord of this Manor, in Conſideration of forty Years Rent paid to him, agreed with the Tenants that they ſhould hold their Cuſtomary Eſtates, doing the Services, and paying the Rents, *&c.* on paying four Years Rent for a Fine, after every Change of the Lord thereof for the Time being, by Death only.

Sir *James Lowther*'s Caſe.

Richard Barwis ſold this Manor to *Richard Lamplugh*, who aſſeſſed and received a general Fine, on *Barwis*'s Death, and *Lamplugh* ſold it to Sir *James Lowther*, who received a general Fine on *Lamplugh*'s Death. By the Admittances taken by the Tenants from Sir *James Lowther*, their Eſtates are ſaid to be then in the Lord's Hand, and ſo re-granted, on paying the Fine.

On *Richard Barwis*'s Reducing the Fine from being arbitrary to a Fine certain, the Tenants agree to pay four Years Rent on the Change of the Lord for the Time being, by Death only.

In Conſideration of forty Years Rent paid to the Lord, the Tenants are afterwards to hold their Eſtates, paying two Years Rent for a Fine after every Change of the Lord for the Time being, by Death only.

Tomlinſon's Caſe.

Richard Barwis ſold his Manor to *John Tomlinſon*, who aſſeſſed and received a general Fine, on *Barwis*'s Death.

This Indenture recites Diſputes about the arbitrary Fines, which were referred to the then Lord *Morpeth*, who awarded

the Tenants to pay a Sum of Money to reduce the Fines to a Certainty, and ſettled the future Fines at ten Years Rent, upon the Change of the Lord for the Time being, by Death only; which the Tenants covenant to pay, by or by Reaſon of the Death of the Lord of the Premiſſes.

Gerrard's Caſe.

Francis Howard, Eſq; laſt general admitting Lord, conveyed this Manor to Sir *William Gerrard*, who, upon *Howard*'s Death, aſſeſſed a general Fine, and afterwards ſold the Manor to *John Warwick*, Eſq; who died in Poſſeſſion, but no general Fine was aſſeſſed and paid to *Warwick*'s Heir, 'till Sir *William Gerrard*'s Death.

This is upon the general Cuſtom without an Indenture.

Rolfe's Caſe.

Rolfe brought an Action of Debt againſt one *Scott*, a Tenant of the Manor, for a general Fine, due on the Death of *Richard Tolſon*, the laſt general admitting Lord, who had ſold the Manor to *Rolfe* many Years before he died, and *Rolfe* recovered a Verdict at the Aſſizes at *Carliſle*, for the ſaid Fine, even though *Scott* had been admitted upon a dropping Fine, by *Rolfe* himſelf, in *Tolſon*'s Life-time, to hold during *Rolfe*'s Life and the Tenants.

DE
Term. Paſch.
11 *Georgii* I.
In the KING'S BENCH.

Shaw verſus *Weigh & al'.*

Conſtruction of a Will of Lands, whether it gave an Eſtate for Life only, or an Eſtate-Tail.

IN Ejectment in the Court of Great Seſſions for the County of *Flint*, by *William Shaw*, Gent. againſt *Catherine Weigh* and fourteen others, Tenants in Poſſeſſion of Lands in the ſaid County, upon two Demiſes of the ſaid Premiſſes, the one from *Ravenſcroft Gifford*, Eſq; for the Term of ſeven Years from the firſt of *July* 1719; and the other from *David Parry*, Gent. for ſeven Years from the ſecond of the ſame *July*. Not guilty pleaded, on the Trial of which Iſſue, at the Seſſions held the 7th of *April* 1720, the Jury find one of the Defendants Not guilty; and as to the reſt of them they find a ſpecial Verdict to the Effect following.

That *Tho. Ravenſcroft*, Eſq; was ſeiſed in Fee of the Premiſſes in Queſtion on the firſt of *Auguſt* 1675. And being ſo ſeiſed,

The ſpecial Verdict finds the Will *verbatim*.

On the ſecond of *Auguſt* 1675, the ſaid *Thomas Ravenſcroft* made his Will in Writing, which they find *verbatim*; in which the ſaid Teſtator, after particularly deſcribing the Premiſſes now in Queſtion, deviſes the ſame in the Words following:

" All which ſaid Lands, Houſes, Outhouſes, Tenements, " and Hereditaments, with their and every of their Appur-

" tenances, with all Deeds, Evidences and Writings concer-
" ning the ſame, I do hereby give, deviſe and bequeath un-
" to my ſaid dear Wife *Dorothea Ravenſcroft*, for and du-
" ring the Term of her natural Life; and for her better
" Support and Credit, and for the better ſatisfying and diſ-
" charging my Debts, in the Tenderneſs of my dear Af-
" fections I bear my ſaid Wife, ſhe being weak, ſickly and
" ſhiftleſs, I give, deviſe and bequeath unto my ſaid Wife,
" the full Sum of 500 *l.* to be raiſed by her, her Execu-
" tors, Adminiſtrators or Aſſigns, by Sale of Timber, or
" by Sale of any Part of the Premiſſes before-named or men-
" tioned, or otherwiſe by digging, ſinking, getting and Sale
" of Coal on the Premiſſes, or any Part thereof, at her, her
" Executors, Adminiſtrators or Aſſigns Election or Choice.
" And if my ſaid Wife ſhall happen to die and depart this
" Life before the ſaid Sum of 500 *l.* be raiſed by Sale of
" Timber, or by Sale of ſome Part of the Premiſſes, or by
" Sale of Coals as aforeſaid, I do then hereby give full
" Power and Authority to my ſaid dear Wife, by her laſt
" Will and Teſtament in Writing, or by her Deed or Deeds
" under her Hand and Seal, to appoint any Perſon or Per-
" ſons to raiſe the ſaid 500 *l.* by Sale of Timber, or by Sale
" of Coals as aforeſaid, or by Sale of any Part of the Pre-
" miſſes as aforeſaid. Provided nevertheleſs, That if either
" my Siſters hereafter named, or ſuch Perſon or Perſons for
" whom my Truſtees hereafter named ſhall be Truſtees for,
" ſhall well and truly pay or cauſe to be paid unto my ſaid
" dear Wife, her Executors, Adminiſtrators or Aſſigns, the
" ſaid Sum of 500 *l.* or according as my ſaid Wife ſhall by
" Will or Deed deviſe or diſpoſe the ſame; that then the
" ſaid Power of ſelling any of the Premiſſes, of felling
" and ſelling any Trees, or of digging, ſinking for, getting
" and ſelling of Coals, ſhall ceaſe and determine by her
" my ſaid Wife, her Executors, Adminiſtrators and Aſſigns,
" any thing in this my Will to the contrary notwithſtanding.
" And from and after the Deceaſe of my ſaid Wife, I give,
" bequeath, deviſe and diſpoſe all my ſaid Eſtate before
" meant, named, or mentioned, within the ſaid Pariſh of
" *Hawarden*, conſiſting in Houſes, Outhouſes, Lands, Tene-
" ments, and Hereditaments, with their and every of their

" Appur-

" Appurtenances unto *Francis Brampſton*, Serjeant at Law,
" and to *Charles Nott* of *Bybrook* in the County of *Kent*,
" Gent. and to *Edward Parry* of the Six Clerks Office
" *London*, Gent. and to the Survivor and Survivors of them,
" upon the Truſt hereafter mentioned; ſubject nevertheleſs
" to the raiſing of the aforeſaid 500 *l.* that is to ſay, in
" Truſt to and for my loving Siſters *Anne Lunsford* and *Doro-*
" *thy Evatt* the Wife of Major *Evatt*, equally betwixt them,
" during their natural Lives (without committing any Man-
" ner of Waſte) from and after the Deceaſe of my ſaid
" Wife. Provided always, that what Sum or Sums of Mo-
" ney, in Part or in full, of the ſaid 500 *l.* hereby left my
" Wife, ſhall be really paid my ſaid Wife, her Executors,
" Adminiſtrators or Aſſigns, by either of my ſaid Siſters; that
" in that Caſe my Will and Meaning is, that ſuch Monies be
" likewiſe raiſed by getting of Coal on the Premiſſes only.
" And if either of my ſaid Siſters happen to die, leaving
" Iſſue or Iſſues of her or their Bodies lawfully begotten or
" to be begotten, then in Truſt for ſuch Iſſue or Iſſues of
" the Mother's Share; or elſe, in Truſt for the Survivor or
" Survivors of them and their reſpective Iſſue or Iſſues.
" And if it ſhall happen, that both my ſaid Siſters die with-
" out Iſſue as aforeſaid, and their Iſſue or Iſſues to die
" without Iſſue or Iſſues lawfully to be begotten; then the
" ſaid Truſtees to ſtand and be intruſted to and for my
" Kinſman Mr. *John Swift*, and the Heirs Male of his Body
" lawfully begotten; and for Want of ſuch Iſſue, then in
" Truſt for my Godſon *Ravenſcroft Gifford* and the Heirs
" Male of his Body lawfully to be begotten, provided that
" the Heir Male be chriſtened *Thomas Ravenſcroft*; and for
" Want of ſuch Iſſue, then in Truſt for the Heirs Male
" of *William Ravenſcroft* of *Cornhill London*, Mercer, law-
" fully begotten and to be begotten; and for Want of
" ſuch Iſſue, then in Truſt for my Couſin Mr. *George Ra-*
" *venſcroft* of *London*, Merchant, and his Heirs for ever,
" lawfully begotten or to be begotten."

The Teſtator dies *ſans* Iſſue.

The Jury further find, that the ſaid *Thomas Ravenſcroft* died on the 15th of *October* 1677, ſeiſed of the Premiſſes, without Iſſue; that on the 16th of *October* aforeſaid, the

ſaid Teſtator's Widow, *Dorothea Ravenſcroft*, entered into the ſaid Premiſſes, and was ſeiſed, and died the firſt of *May* 1683; that on the 2d of *May* aforeſaid Teſtator's Siſters, *Anne Lunsford* and *Dorothy Evatt*, entered and were ſeiſed of the Premiſſes; that on the 28th of *September* 1686 the ſaid *Anne Lunsford* died, having never had any Iſſue; that on the 1ſt of *October* 1686 *Dorothy Evatt*, the Survivor entered, and was ſole ſeiſed of the Premiſſes, and being ſo ſeiſed, at the great Seſſions for the ſaid County of *Flint*, held the 9th of *April* 1688, the ſaid *Dorothy Evatt* levied a Fine, with Proclamations of the Premiſſes to *Thomas Williams*, Gent. to make him Tenant to the Precipe in a Common Recovery which was ſuffered of the ſaid Premiſſes at the ſame Seſſions, between *Thomas Harpur*, Gent. Demandant, and the ſaid *Thomas Williams*, Tenant, who vouched to warranty the ſaid *Dorothy Evatt*, who vouched over the Common Vouchee, upon which Recovery, Execution was duly awarded and had, *&c.*

his Wife dies;

his Siſters enter;

one of them dies *ſans* Iſſue.

The Survivor ſole ſeiſed;

levies a Fine and ſuffers a Recovery.

That the ſaid Recovery and Execution was declared by the ſaid *Dorothy Evatt*, to be to the Uſe of the ſaid *Dorothy Evatt*, and her Heirs for ever; by Virtue of which Recovery and Execution, the ſaid *Dorothy Evatt* was ſeiſed of the Premiſſes *prout lex poſtulat.*

The Uſe declared.

The Jury further find, That on the 26th of *Feb.* 1697, *John Swift* in the Will named, died without Iſſue; that the ſaid *Dorothy Evatt*, was the Siſter and Heir of the Teſtator *Thomas Ravenſcroft*; that *Ravenſcroft Gifford*, one of the Leſſors of the Plaintiff in the Year 1693, in the Life-time of the ſaid *Dorothy Evatt* and *John Swift* went out of this Kingdom to Parts beyond the Seas, and continued ſo beyond Sea till the 6th of *May* 1719.

That Serjeant *Brampſton* and Mr. *Nott*, two of the Truſtees in the ſaid Will, died in the Life-time of *Edward Parry* the other Truſtee; and that *David Parry* the other Leſſor of the Plaintiff is Couſin, and Heir of the ſaid ſurviving Truſtee. That on the 12th of *July* 1698 *Dorothy Evatt* died, having never had any Iſſue; that the ſaid *Ravenſcroft*

Gifford entered into the Premiſſes and was ſeiſed thereof, *prout lex poſtulat*; and on the 1ſt of *July* 1719 made the Leaſe as in the Declaration; that *David Parry* the Truſtee, made the like Entry and Leaſe on the 2d of *July* aforeſaid, by Virtue of which Demiſes the Plaintiff entered and was poſſeſſed of the Premiſſes; and that on the 3d of *July* aforeſaid the Defendants entered and ouſted the Plaintiff; but whether upon the whole, the Defendants are Guilty or not of the Treſpaſs and Ejectment in the Declaration, the Jury leave to the Determination of the Court, and according to ſuch Determination they find them Guilty or Not guilty.

Judgment at the great Seſſions in favour of the Eſtate-Tail.

Upon this Verdict (after ſeveral Continuances) Judgment was given at the great Seſſions for *Flint*, held the 23d Day of *March* 1721 by Mr. *Cowper*, now Mr. Juſtice *Cowper* and Mr. *Francis Winnington*, Deputy to Mr. *Jeffrys*, for the Defendants; and Coſts were taxed at 45 *l.* 18 *s.* 2 *d.*

Error brought in *B. R.*

This Record was brought up to the Court of *King's Bench* by Writ of Error, returnable *Craſtino Aſcenſionis Domini* in the 8th of the late King 1722.

This Caſe was firſt ſpoke to *Trin.* 10 *Geo.* 1.

Reeve for the Plaintiff, argued that the Judgment is Erroneous.

Upon this Record three Queſtions ariſe.

Firſt, What Eſtate the Truſtees take. *Secondly*, Whether the Teſtator's two Siſters take an Eſtate-Tail or for Life. *Thirdly*, If they have an Eſtate-Tail, whether Judgment ought not to have been given for the Plaintiff for the Moiety of *Anne Lunsford.*

Firſt Point, What Eſtate the Truſtees take. The Eſtate is deviſed to them, and to the Survivors and Survivor of them, in Truſt, *&c.* but not to them and their Heirs; however, by the Intent of the Teſtator, collected from the Will,

they muſt be conſtrued to have a Fee, for ſeveral Eſtates are limited to ariſe out of their Eſtate, which may have Continuance for ever, and that cannot be unleſs the Truſtees have a Fee; in Common Law Conveyances, the Word *Heirs* may be neceſſary to create a Fee, but it is not always ſo in a Will; *for ever* will carry a Fee in a Will, and there is no Difference between a Deviſe to one for ever, and to one upon ſuch Truſts as may continue for ever. 3 *Co.* 20. *b.* *Cro. Jac.* 527. Deviſe of Lands to one, paying to another a Sum in Groſs, or an Annuity for Life, carries a Fee to the Deviſee. *Hill.* 2 *Ann. B. R. Counteſs of Bridgwater* verſus *Duke of Bolton.* It was reſolved, 1*ſt*, That a Deviſe of Land to *A.* paying ſeveral annual Sums of Money was a Fee-ſimple. 2*dly*, That a Deviſe of all my Eſtates and Hereditaments, will give a Fee; which laſt Reſolution is parallel to the preſent Caſe, for here the Teſtator Deviſes "All my Eſtate, conſiſting in Houſes, Out-"houſes, Lands, Tenements and Hereditaments", to his Truſtees. *Mich.* 5 *Ann. Smith* verſus *Tindal*, *Holt*, Chief Juſtice, declared his Opinion to be, that a Fee paſſes by a Deviſe of all my Hereditaments, becauſe Hereditaments are deſcendible in their Nature to the Heir, for whatſoever may be inherited is an Hereditament. 1 *Inſt.* 6. *a.* *Hob.* 2. 1 *Vent.* 299. 2 *Lev.* 169. The Intention of the Teſtator is the Guide in the Conſtruction of a Will, as the Intention of the Party is the Guide in the raiſing and direction of Uſes; for if a Perſon intends to convey an Eſtate by a Common Law Conveyance, which fails for want of ſome Circumſtance or Ceremony, yet it ſhall operate as a Covenant to ſtand ſeiſed to Uſes. 1 *Vent.* 137. 1 *Mod.* 175. *Croſſing* verſus *Scudamore*, 3 *Lev.* 371. which Reſolutions are conformable to 1 *Inſt.* 49. *a.* The Truſts to the two Siſters and the other Remainder, are Truſts executed by Statute 27 *H.* 8. of Uſes, and amount to the ſame as if the Deviſe had been to the Truſtees, to the Uſe of the ſeveral Deviſees; for the Words *Uſe* and *Truſt* are ſynonymous Terms, and as ſuch uſed in the Statute of 27 *H.* 8. and no Difference between a Deed and a Will, which Points were ſolemnly determined in the Caſe of *Broughton* verſus *Langley*, *Paſch.* 2 *Ann.* And of conſequence *Parry*, one of the Leſſors

The Word *Heirs* not neceſſary in a Will to create a Fee.

3 Danv. Abr. 175, p. 12. Eq. Abr. 177. p. 17. 1 Salk. 236. 6 Mod. 106. Salk. 685.

Eq. Abr. 383. p. 3. Salk. 679. 1 Lutw. 314.

ſors of the Plaintiff, has an Eſtate ſufficient to make a Leaſe to Plaintiff.

That the Sifters took for Life only, &c.

Second Point; (Which is the great Point of the Caſe) What Eſtate the two Siſters take by the Deviſe; I hold they take only an Eſtate for Life, with contingent Remainder in Tail to their Iſſue if any; it is deviſed after his Wife's Death (and ſubject to the Payment of the 500 *l.* given to her by the Will) to his two Siſters, equally betwixt them during their natural Lives, without committing any Waſte; "And if either of "my ſaid Siſters happen to die, leaving Iſſue or Iſſues of "her or their Bodies, then in Truſt for ſuch Iſſue or Iſſues "of the Mother's Share, or elſe in Truſt for the Survivors "or Survivor of them, and their reſpective Iſſue or Iſſues; "and if it ſhall happen that both my Siſters die without Iſ-"ſue or Iſſues as aforeſaid, and their Iſſue or Iſſues to die "without Iſſue or Iſſues, then the Truſtees to ſtand and be "ſeiſed in Truſt for my Kinſman *John Swift*". The Eſtate expreſly deviſed, is only for Life, ſo that to make it an Eſtate-Tail, muſt be by Conſtruction and Implication ariſing from the Intent of the Teſtator, whereas no ſuch Intent appears in the Will, but the contrary, for the Clauſe relating to Waſte muſt be rejected, if the Eſtate is conſtrued an Eſtate-Tail. Beſides the Clauſe impowering the Siſters on paying the 500 *l.* to raiſe the Sum by getting of Coal on the Premiſſes, had been needleſs if they took an Eſtate of Inheritance, becauſe that would have been the Conſequence of ſuch Eſtate. The following Clauſe, *If either of my Siſters happen to die without Iſſue, &c.* cannot inlarge or alter the former Limitation for Life; becauſe the Eſtate is then limited to their Iſſue and the Iſſue of ſuch Iſſue. The Words *Survivors or Survivor* muſt refer to the Iſſue; for, there can be but one Survivor of two Siſters. Wherever the Words of Limitation are annexed to the Iſſue of the Deviſee, the Deviſee takes only an Eſtate for Life. Deviſe of Land to a Man and his Children or Iſſue is an Eſtate-Tail if he hath no Iſſue. 6 *Co.* 17. *a.* And according to the Caſe of *King* and *Melling*, 2 *Lev.* 58. 1 *Vent.* 214, 225. Deviſe of Land to a Man and the Iſſue of his ſecond Feme (he having then a firſt Feme) is an Entail. But a Deviſe to *R.* and to

the next Heir Male of *R.* and to the Heirs Male of the Body of ſuch next Heir Male, is but an Eſtate for Life in *R.* 1 *Co.* 66. *W. Archer*'s Caſe. *Hill.* 12 *Ann. Backhouſe* and *Wells.* Deviſe to *A.* for Life only, and after his Death to his Iſſue Male, and to the Heirs Male of the Body of ſuch Iſſue, was adjudged but an Eſtate for Life; for, *Iſſue* is properly a Word of Purchaſe, and is ſo conſtrued, unleſs the Intent of the Teſtator appears to warrant a contrary Conſtruction. 3 *Lev.* 432. When the Deviſor intends to paſs an Eſtate-Tail (as he does to *John Swift*) he has uſed proper Words, *To* John Swift, *and to the Heirs Male of his Body*; ſo that the Variance in the Expreſſion proves the Difference in the Intent.

Eq. Abr. 184. p. 27. 1 Mod. Rep. 261. Caſes in Law and Equ. 181.

Third Point. Admitting the Eſtates of the two Siſters to be an Eſtate-Tail, yet the Judgment is erroneous: For the Plaintiff ought to have recovered a Moiety of the Premiſſes which belonged to *Anne Lunsford.* The two Siſters were Tenants in common, and had no croſs Remainders; and when *Anne Lunsford* died, her Share deſcended to the Plaintiff the next in Remainder; for ſhe did no act to bar the Remainder. The Words in the Will, *if both my Siſters happen to die*, muſt be taken diſtributively, according to *Wyndham*'s Caſe in 5 *Co.* 7.

Admitting an Eſtate-Tail, the Recovery ſhould have been only of a Moiety.

2 D'Anv. 213. pl. 13. Moor 191.

Bootle for the Defendants. The great Queſtion on this Record is, What Eſtate the two Siſters take? By the Will they take an Eſtate-Tail in common with croſs Remainders for Life. It is to be obſerved that the Siſters had no Iſſue at the Time of the Deviſe, or ever after. A Deviſe to one and his Iſſue, he then having none, is an Eſtate-Tail. *Iſſue* is *Nomen collectivum*, and as extenſive in a Will as *Heirs of the Body*; and as ſuch is uſed in the *Stat. De Donis*, 13 *E.* 1. & 34 *H.* 8. Deviſe to one and his *Iſſue*, is ſtronger than a Deviſe to one and his *Children*; and yet in ſuch Caſe he takes an Eſtate-Tail if he has no Children. 6 *Co.* 17. *Wild's* Caſe. There is no Difference between a Deviſe to one and to his Iſſue, and to one and if he dies without Iſſue, Remainder to another; only in the firſt Caſe he takes an Eſtate-Tail by expreſs Limitation, and in the other by Implication.

Iſſue is *Nomen collectivum.*

Moor 127. 1 *Vent.* 225, 230. *Hill.* 7 *Geo.* 1. in *Scacc.* (Equity) *Sutton* verſus *Paman.* *John Sutton* by Will deviſed to his Nephew *Thomas Sutton* All his Freehold and Copyhold Lands in *Suffolk*; and alſo deviſed to him (after the Death of his Wife) the *Chequer* Inn for Life; and after his Death, to the firſt Son of his Body, and to the Heirs Male of the Body of ſuch firſt Son, and ſo on to the ſecond, third and fourth Sons in Tail, Remainder to his two Siſters; provided that his Nephew commit no Manner of Waſte; and that immediately after the Death of his Wife, and of his Nephew *T. S.* without Iſſue Male of his Body, or after the Death of ſuch Iſſue Male, the *Chequer* Inn ſhall go to ſuch a Charity. *T. S.* had no Iſſue at the Time of the Will; ſo that the Queſtion was, What Eſtate he took by the Will? And it was adjudged by the Court, that he took an Eſtate-Tail by the latter Words, *After the Death of my Nephew without Iſſue of his Body*, tho' at firſt the Eſtate was only limited to him for his Life, Remainder to his firſt, ſecond, third and fourth Son in Tail, without farther limiting the ſame to all the other Iſſues. Which Judgment as to this Point was affirmed upon an Appeal in the Houſe of Lords, tho' the Decree as to the Queſtion relating to the Charity was reverſed.

That there are croſs Remainders.

If the Words in the Caſe at Bar do create an Eſtate-Tail, then there are croſs Remainders for Life in the two Siſters. *Raym.* 452. 2 *Jones* 170. And ſuch croſs Remainders cannot be impeded by the Limitation to them during their natural Lives; becauſe, whenever the Iſſue claim, they muſt claim as Heirs to their Mother; which cannot be till after their Mother's Deceaſe. *Langley* and *Baldwyn*, *C. B.* 19th *May* 1727. a Cauſe referred from Chancery for the Opinion of the Court upon a Will. *Jonathan Langley* the Grandfather, 1666, deviſed certain Lands to his eldeſt Son for Life without Impeachment of Waſte, Remainder to *Jonathan* his Granchild for Life, without Impeachment of Waſte; with a Power for him to limit a Jointure of the ſame Land to any Woman he ſhould marry for her Life; and after his Death, he deviſed the Lands to the firſt Son of *Jonathan* the Grandchild in Tail, and ſo to the ſixth Son; and then deviſed,

Eq. Abr. 185. p. 29. 1 Mod. Rep. 258.

that if *Jonathan* the Grandchild ſhould die without Iſſue Male, that the Land ſhould remain to *J. S.* The Queſtion was, What Eſtate *Jonathan* took by the Will? And the Court certified their Opinion to be, that he took an Eſtate in Tail Male by Virtue of the latter Words, *if he died without Iſſue Male*; tho' the Eſtate was deviſed expreſsly for Life, and without Impeachment of Waſte; and tho' a Power was given to limit a Jointure, which was needleſs if the Teſtator intended to give him an Eſtate-Tail. I admit the Clauſe, *without Impeachment of Waſte*, is void if the Eſtate is an Intail, but that Clauſe being added, can never have ſo great Effect as to abridge an Eſtate before limited by expreſs Words, *in Tail*, by turning it in Conſtruction to an Eſtate for Life only. Such Clauſe was in the Caſe of *Langley* and *Baldwyn*. And laſtly, the Clauſe, *If both my Siſters die without Iſſue, and their Iſſue die without Iſſue*, can have no Influence in conſtruing the Eſtate to be only for Life; for, *Iſſue* is a Word of Limitation; and it is not like *Archer*'s Caſe, 1 *Co.* where the Words of Limitation were added to the next Heir Male; which is not ſo in the preſent Caſe.

Sans Waſte to be rejected.

Eq. Abr. 185. pl. 29. 1 Mod. Caſes 258.

Ante p. 60.

Reeve's Reply. The Diſtinction when there ſhall be croſs Remainders, and when not, is, where the Limitation is only to two Perſons; and if they die without Iſſue, Remainder over. In ſuch Caſe, the Survivor ſhall hold for Life; but otherwiſe it is where the Limitation is to four or five Perſons, by Reaſon of the Confuſion that muſt follow.

A Diſtinction as to croſs Remainders by Implication.

Juſtice *Forteſcue A.* At preſent I am of Opinion, that this is an Eſtate-Tail; *Iſſue* is a Word of Limitation, and really more expreſſive than *Heirs of the Body*; for it extends to all Iſſues that can poſſibly be. Other Words may ſo reſtrain the natural Import of them, as that an Eſtate for Life only may paſs; but in this Caſe the Teſtator has uſed Words to anſwer any Objection that might be made, as follow, *If both my Siſters die without Iſſue, and their Iſſue or Iſſues die without Iſſue or Iſſues*; ſo that there can be no Pretence for reſtraining the Deviſe only to one Iſſue of the Body. Iſſue if any be then in Being, will take an immediate Eſtate by the Deviſe. *Loddington* and *Kime*, 3 *Lev.* 431. was a Deviſe to

That it is a Deviſe in Tail to the Siſters.

Evers

Evers Armin for Life without Impeachment of Waſte, and if he has Iſſue Male, to ſuch Iſſue Male and his Heirs for ever, charged with a Rent-Charge; and after the Death of *E. Armin*, in caſe he leaves no Iſſue Male, Remainder over. There it was held, that *E. A.* took only an Eſtate for Life, becauſe the Limitation was to the Iſſue Male and his Heirs. So 1 *Co. Archer*'s Caſe; ſo *Burchet* verſus *Durdant*, 2 *Vent.* 311. Deviſe to *R. D.* for Life, and after his Deceaſe to the Heirs Male of the Body of *R. D.* now living; and to ſuch other Heir Male and Female as he ſhall hereafter happen to have of his Body, Remainder over. This was a Deviſe to *R. D.* only for Life, with a Remainder veſted in the Son; for, *Heir Male of the Body of* R. D. *now living*, was a ſufficient *Deſignatio Perſonæ*. And in the Caſe of *Bevers* and *Hall*, in the Houſe of Lords, the like Reſolution was given where there were other Words tantamount to the Words *now living*.

The Clauſe in the Will, "If either of my Siſters die, "leaving Iſſue or Iſſues, then in Truſt for ſuch Iſſue "or Iſſues of the Mother's Share; or elſe in Truſt for "the Survivors or Survivor of them," plainly implies croſs Remainders for Life. *Or elſe in Truſt for the Survivors or Survivor of them*, according to grammatical Conſtruction, muſt refer to the next Antecedent, which is, the Mother: The ſubſequent Words, *If both die without Iſſue, and their Iſſue die without Iſſue*, create the Intail; for theſe Words are no more than if it had been expreſſed only, *If they die without Iſſue*.

Objections anſwered.

As to the Objections: *Firſt*, That the Eſtate was expreſsly limited only for Life. Many Caſes have over-ruled this Objection, and by reaſon of ſubſequent Words conſtrued the Eſtate to be an Intail.

Secondly, As to the Power to raiſe the 500 *l.* which has been compared to the Power to make a Jointure; there was ſuch a Power in the Caſe of *King* and *Melling*, which nevertheleſs was adjudged an Eſtate-Tail. Beſides, ſuch Power is not uſeleſs, if the Eſtate be conſtrued an Eſtate-Tail; becauſe Tenant in Tail is not bound to ſuffer a common Recovery.

Ante p. 64.

As to the firſt Point in the Caſe, a Truſtee of Neceſſity muſt have as large an Eſtate as the Truſts require, which are to ariſe out of that Eſtate; for the Court of Chancery can never compel a Truſtee for Life to convey an Eſtate in Fee. 1 *Roll. Abr.* 611. *Croſſing* verſus *Scudamore.* 2 *Lev.* 9. 1 *Vent.* 137. 1 *Mod.* 175. 2 *Keb.* 754, 784. That the Truſtees took a Fee.

Raymond Chief Juſtice: *Firſt*, Tho' in the Deviſe to the Truſtees the Word *Heirs* is omitted, yet ſince the Truſts which are to ariſe out of their Eſtate are to continue for ever, I ſhould think the Truſtees take a Fee; becauſe in a Will a Fee may paſs without the Word *Heirs*. Firſt, that the Truſtees took a Fee.

Secondly, by former Reſolutions: If a Deviſe was to one for Life, and after his Deceaſe to his Children; and that if he died without Iſſue, Remainder to *J. S.* ſuch Deviſee did not take an Intail. *Popham* verſus *Banfield*, 1 *Salk.* 236. For if an Eſtate was limited to one for Life, with Remainder to his firſt, ſecond and third Sons in Tail; and if he died without Iſſue, Remainder over, theſe Words, *If he died without Iſſue*, did not create an Intail, but were conſtrued to be the ſame as *If he died without ſuch Iſſue*. The Queſtion is, Whether Iſſue can be intended *Deſcriptio?* The Sifters for Life only. 2 D'Anv. 237. pl. 5. Eq. Abr. 108. pl. 2. 1 Vern. 79, 167, 344.

This Caſe was argued again in *Hill. Term.* 11 *Geo.* 1. by *Fazakerly*, for the Plaintiff; and *Pengelly*, for the Defendants.

Fazakerley cited new Caſes to the ſecond Point. *Cro. Eliz.* 313. *Clerk* verſus *Day*. *Cro. Eliz.* 453. *Baldwin* verſus *Smith* (the ſame Caſe as 1 *Co.* 66. *Archer*'s Caſe) 1 *Salk* 238. *Aumble* and *Jones*, to prove that the legal Conſtruction ſhall be taken, unleſs the Intent of the Teſtator appears otherwiſe. *Moore* 593. *Clerk* verſus *Day*.

Pengelly, Serjeant, to the ſecond Point cited *Sunday*'s Caſe, 9 *Co.* 127, 128. Where the Words, *If* Thomas *have no Male Iſſue, then* William *to have the Eſtate*, create a Tail. The Inhibiting the Sifters to commit Waſte, ſhews that he

thought they would otherwiſe have a Power, which they could not unleſs they had Tail. 1 *Bulſ.* 219, 223. 1 *Roll. Abr.* 836. *pl.* 11. *Miller* verſus *Legrave*, a late Caſe.

Raymond, Chief Juſtice: The Caſe of *Backhouſe* verſus *Wells* is contrary to the old Rules. I doubt whether the Words *Survivors or Survivor* relate to the Mothers or Children.

Forteſcue A. remained in his former Opinion.

Reynolds, Juſtice: The firſt Point is clear, and the laſt as plain, that there are croſs Remainders.

For an Eſtate for Life to the Siſters. 1 Vent. 214, 225. 3 D'Anv. 182. pl. 21.

As to the *ſecond*, I am not for ſhaking the Authority of *King* and *Melling*; but neither am I for carrying the Thing at all farther. It ſeems to me that the Teſtator only intended an Eſtate for Life to his Siſters. The Words *Survivors or Survivor*, muſt relate to the Children. And then *Survivors or Survivor* are Words of Purchaſe; and *their Iſſue* Words of Limitation. The giving particular Powers, and reſtraining from Waſte, are other Reaſons to confirm this Opinion.

It was argued a third time in *Hill.* 13 *Geo.* 1. 1726. by *Fazakerly* for the Plaintiff; and *Bootle* was to have argued again for the Defendants; but being called away to the Houſe of Lords, he made his Argument *Paſch.* 1727. but nothing new was ſaid by either of them.

This Caſe was argued a fourth Time in *Hill.* 1727. 1 *Geo.* 2. (when Juſtice *Forteſcue A.* was diſmiſſed and Juſtice *Page* put in his Place) by Mr. *Reeve* for the Plaintiff, and *Bootle* for the Defendants; who only repeated their former Arguments. The Court took Time to conſider of it till *Eaſter* Term 1728. upon the laſt Day of which, *viz. June* 3. 1728. *Raymond*, Chief Juſtice, delivered the Opinion of the Court as follows.

Judgment of the Court for an Eſtate for Life only to the Siſters.

Lord Chief Juſtice *Raymond:* This Cauſe of *Shaw* and *Weigh* ſtands for the Judgment of the Court. If this Court be of Opinion with the Plaintiff, that Judgment ought to

be reverſed, no Judgment can be given for him as to the Recovery of the Poſſeſſion of the Premiſſes, the Demiſes laid in the Declaration both expiring in *July* 1726, but he can have Judgment only for the Damages. We are all of Opinion that this Judgment ought to be reverſed.

Reſolved that the Truſtees took a Fee by Implication.

The firſt Queſtion in this Caſe was, What Eſtate the Truſtees took in the Premiſſes, becauſe the Deviſe is to them three, and the Survivor or Survivors of them, and no Words of Limitation are annexed to their Eſtate, nor is it ſaid to the Heirs of the Survivor, but it is given to them *upon the Truſts herein after mentioned*; now if they did not take a Fee, then their Eſtate would not be ſufficient to anſwer the Truſts therein after mentioned, and ſo all ſuch ſubſequent Truſts would be void; but upon this Point, we are all of Opinion, that the Truſtees take a Fee-ſimple by Implication, for the Intent of the Teſtator plainly appears, *viz.* that they ſhould have an Eſtate ſufficient to ſatisfy and anſwer all the Truſts in the Will, which muſt be an Eſtate of Inheritance; there is no Difference in Reaſon between a Deviſe to a Man for ever, and to a Man upon Truſts which may continue for ever, for the Implication is guided by the Intention of the Teſtator. There is a Caſe 1 *Roll's Abr.* 611. *L. K. pl.* 12. a Man ſeiſed of Lands by his Will deviſes that *J. N.* and *J. D.* and their Heirs ſhall ſtand ſeiſed of his Land, to the Uſe of *J. S.* tho' *J. N.* and *J. D.* have nothing in the Land, yet this is a good Deviſe to *J. S.* for either it ſhall amount to a Deviſe to the Feoffees to his Uſe, or an immediate Deviſe to him, for the Intention of the Teſtator is plain that *J. S.* ſhall have it; ſo that this Deviſe before us, ſhall be made good by Implication one way or other; either it is a Deviſe to the Truſtees, ſubject to the Truſts in the Will, or an Eſtate in the Perſons to whoſe Uſe and Benefit it was intended by the Teſtator.

The ſecond and chief Queſtion was, What Eſtate the Teſtator's two Siſters *Anne Lunsford* and *Dorothy Evatt* took, whether an Eſtate-Tail, or for Life only?

If

If they took an Eſtate-Tail, then the Judgment below is right, for by the Fine and Recovery the Remainders were barred; but if they took an Eſtate for Life, then it is only a Forfeiture of their Eſtate, and no bar to the Remainder of the Leſſor of the Plaintiff.

Reſolved that the Siſters took only for Life.

We are all of Opinion, that by this Deviſe, *Anne Lunsford* and *Dorothy Evatt* took only an Eſtate for Life, with a contingent Remainder to their Iſſue or Children in Tail, this is apparent from the Words of the Will and the Intent of the Teſtator.

Firſt as to the Words, it is an Eſtate expreſly deviſed to the two Siſters for their Lives, with the Addition of theſe Words, *without committing any Manner of Waſte*; the Intent of the Teſtator muſt be collected from the Wording or Penning of the Will, and comparing the Parts of it together; when he deviſes an Eſtate to his Wife for Life, it is in the very ſame Words as the Deviſe to his Siſters; and immediately after declaring for what Purpoſe he gave his Wife the 500 *l.* he gives her Power by Sale of Timber, or by Sale of any Part of the Premiſſes, or by Sale of Coal to raiſe that Sum; which Power was neceſſary for her, ſhe having but an Eſtate for Life, and could not raiſe the 500 *l.* without it; when he deviſes to his Siſters, he adds Words of Reſtraint, and makes their Power leſs than his Wife's; for in caſe they paid the 500 *l.* they were to raiſe it again by getting of Coals only, and not by Sale of Timber or any Part of the Premiſſes, from whence I infer, that he intended them only an Eſtate for Life: if he had deſigned them an Eſtate-Tail, he would not have given them this Power, for Tenants in Tail may commit Waſte by Virtue of their Eſtate, nay, they may bar the Remainder, *&c.*

There is a Power given to the Wife and both the Siſters, to raiſe the Sum of 500 *l.* as above, and none to the Iſſue, yet we are of Opinion, that by the Penning and Words of the Will, the Iſſue might pay it; for the Proviſo is, "That "if either Siſter, or ſuch Perſon for whom the Truſtees he

" named ſhould be Truſtees (that is the Iſſue) if they pay " the Money, then the Truſt as to the Power of ſelling " Timber, *&c.* was to ceaſe, and there is no Power for the " Iſſue to reimburſe themſelves.

Here is another Thing to be obſerved upon this Clauſe of the Will, that this Power which is given to the Siſters, intervenes between the expreſs Deviſe to the Siſters for Life, and the Deviſe to the Iſſue, which looks as if the Teſtator intended to compleat the Deviſe to them before the Diſpoſition to the Iſſue; and the giving the Siſters this Power, ſhews he thought they wanted it; ſurely he did not intend to give them an Eſtate-Tail, when he gave it them without Power to commit Waſte, for would he put it in their Power to alien the whole Land, whom he had reſtrained from committing Waſte upon any Part of it? Beſides it would have been repugnant to have reſtrained them from committing Waſte, which is incident to every Eſtate-Tail, if he had intended them ſuch an Eſtate; whenever an Eſtate is given to a Man without Impeachment of Waſte, thoſe Words are look'd upon as a plain Indication in the Teſtator, to paſs an Eſtate for Life only, for if he intended to give an Eſtate-Tail, thoſe Words would be impertinent, ſo here to reſtrain them from committing Waſte, ſeems as if he intended to give them an Eſtate for Life only.

Waſte reſtrained.

Then the Will goes on, " And if either of my ſaid Si- " ſters happen to die, leaving Iſſue or Iſſues of her or their " Bodies, lawfully begotten, or to be begotten, then in " Truſt for ſuch Iſſue or Iſſues of the Mother's Share, or " elſe in Truſt for the Survivors or Survivor of them and " their reſpective Iſſue or Iſſues; and if it ſhall happen that " both my ſaid Siſters die without Iſſue as aforeſaid, and " their Iſſue or Iſſues to die without Iſſue or Iſſues lawfully " begotten, then a Deviſe over.

It is a Queſtion, whether the Word *Iſſue* in this Caſe, be a Word of Limitation, or Purchaſe as *Deſignatio Perſonæ*; it is objected that Iſſue is *Nomen collectivum*, and takes in all the Deſcendants, and is as extenſive as Heirs of the Body;

Iſſue is ſometimes a Word of Purchaſe;

I agree, that had the Deviſe been to the Siſters for Life, and then to their Iſſue, or in Truſt for them and their Iſſue, this would have been an Eſtate-Tail. But this Word *Iſſue* is by no Means a proper technical Word, or Term of Law for a Limitation; tis ſometimes uſed as a Word of Purchaſe, and ſometimes as a Word of Limitation according to the Nature of the Inſtrument in which it is uſed, and according as it is intended by the Party. In a Common Law Conveyance it is a Word of Purchaſe and not of Limitation. 2 *Inſt.* 334. 'Tis there ſaid, that the Word *Heirs* is requiſite to create an Eſtate-Tail, unleſs in a Will. *Roll. Abr.* 837. *l. R. pl. T.* It is there ſaid, that in a Deed an Eſtate-Tail cannot be raiſed by way of Uſe without the Word *Heirs*; 'tis otherwiſe in the Caſe of a Will: If an Eſtate be by Will given to a Man and his Iſſue, this is a Limitation; not ſo much from the Force of the Words, as to anſwer the Intent of the Teſtator. If a Deviſe be made to *A.* for Life, and after his Deceaſe to the Iſſue of the Body of *B.* and the Heirs of their Bodies, theſe are Words of Purchaſe; they depend on the Intent of the Teſtator.

at other times of Limitation.

Heirs.

Difference between a Deed and a Will.

When *Iſſue* is a Word of Purchaſe, it is not *Nomen Collectivum*, to extend to and take in all the Deſcendants through all Generations. 3 *Lev.* 431. The Caſe of *Loddington* and *Kime*, which is alſo reported in 1 *Salk.* 224. which was this, Sir *Michael Armin* was ſeiſed in Fee of the Manor of *Pickworth* and Deviſes in theſe Words: "As concerning my Ma- "nor of *Pickworth* and *Willoughby*, after my juſt Debts and "Legacies paid, I deviſe them to my Uncle *Evers Armin* for "his Life without Impeachment of Waſte; and in caſe he "ſhall have Iſſue Male, to ſuch Iſſue Male and his Heirs for "ever; and if he die without Iſſue Male, then to his Ne- "phew and his Heirs." This Caſe is wrongly reported in *Levinz*; he ſays, that the Court were agreed to give Judgment for the Avowant in Replevin. But the Court conceived new Doubts, whether they were contingent Remainders or executory Deviſes to the Iſſue in Tail of *Evers Armin*, *&c.* And before this Point was determined, the Parties came to an Accommodation. Which is a Miſtake; for I heard the Opinion of the Court given *ſeriatim* myſelf, *viz. Paſch.*

Iſſue, when a Word of Purchaſe, how conſtrued.

9 *W.* 3. in the Year 1697. that *Evers Armin* took but an Eſtate for Life, becauſe the firſt Iſſue Male took the contingent Remainder. It has alſo had Deciſions in other Places, been brought into the Court of Chancery, and by Appeal thence carried into the Houſe of Lords, the Judgment given in the Court of Common Pleas was in all thoſe Places confirmed, and not in the leaſt ſhaken, and has been acquieſced under ever ſince. Judgment is entered on the Roll in *C. B. Trin.* 5 *W. & M. Rot.* 1551. as was ſaid by *Eyre* Ch. Juſtice in another Caſe. This ſhews that the Word *Iſſue* is properly a Word of Purchaſe when the Intent of the Party is apparent.

The Caſe of *Backhouſe* and *Wells* when duly conſidered comes up very near to this, which is entered on the Roll, *Trin.* 11 *An. Ro.* 220. That Caſe was, *Thomas Backhouſe* deviſed to *J. B.* for his Life only, without Impeachment of Waſte; and from and after his Deceaſe, then to the Iſſue Male of his Body lawfully to be begotten (if God ſhall bleſs him with any) and to the Heirs Male of the Bodies of ſuch Iſſue lawfully bgotten; and for Default of ſuch Iſſue, Remainder to *T. B.* and the Heirs Male of his Body, and for Want of ſuch Iſſue, two Remainders over in the ſame Words. It was adjudged in this Cauſe, that *J. B.* took only an Eſtate for Life; for tho' the Eſtate was given to him for Life, and there was a Limitation afterwards to his Iſſue; yet it was adjudged to be only an Eſtate for Life in him, and that the Iſſue took by Purchaſe; there Iſſue Male was a Deſcription of the Perſon that was to take the Eſtate-Tail. Ante p. 65.

In this Caſe before us, let us ſee whether the Word *Iſſue* ſhall not be taken as *Deſignatio Perſonæ.*

The Teſtator's Intention appearing, that the Siſters ſhould take an Eſtate for Life only, is an Argument that the Word *Iſſue* muſt be intended as the Deſcription of ſomebody to take after, and ſo Words of Purchaſe.

To proceed, The Words in the Will are, " In Truſt for " ſuch Iſſue or Iſſues of the Mother's Share; or elſe in " Truſt

" Truſt for the Survivor or Survivors of them." The Words *Survivors or Survivor* muſt refer to the Perſons intended to take immediately before. As to the Mother, it is impoſſible in grammatical Conſtruction to be meant of her; then of the Siſters it cannot be, they are but two, there may be indeed one Survivor, but never two Survivors between two Perſons: Therefore theſe Words are only applicable to the Iſſue; which plainly ſhews the Intention of the Teſtator, or elſe theſe Words muſt be rejected; but where a Word is capable of a proper Signification and may ſtand, it muſt not be rejected, but muſt have ſuch a Conſtruction as will make it take Effect.

Where Words may be rejected or not.

The Will goes farther on and ſays, *and their reſpective Iſſue or Iſſues*; theſe are plainly Words of Limitation, and ſhew that the Teſtator's Intention was, that the Perſons intended to take under the Iſſue, ſhould take an Eſtate to deſcend to their Iſſue; the Words create an Eſtate-Tail in them.

There is a great Difference between an Eſtate given to one for Life, and from and after his Deceaſe to his Iſſue, and an Eſtate to one for Life, and after to his Iſſue, and the Heirs Male of the Iſſue, or the Iſſue of the Iſſue; this is one of the Reaſons given in the before-recited Caſe of *Evers Armin*; for there the Limitation of the Inheritance is not to him, but to his Iſſue Male and his Heirs; the Words *his Heirs*, exclude all Incertainty and ſhew where the Teſtator would lodge the Inheritance.

Ante p. 68.

I have been informed, that in the Caſe of *Backhouſe* and *Wells*, great Streſs was laid, and with good Reaſon, on the Limitation to the Heirs Male of the Body of the Iſſue; for I do not think that Reſolution turned much upon the Word *only*. This is agreeable to what Lord Chief Juſtice *Hale* ſays in the Caſe of *King* and *Melling*, reported in 1 *Vent.* 214, 225 to 232. 3 *Keb.* 99. Which was, *Robert Melling* deviſes in theſe Words, " I give my Land to my Son " *Bernard* for his natural Life; and after his Deceaſe I give " the ſame to the Iſſue of his Body lawfully begotten on a

Ante p. 65.

" ſecond Wife; and for Want of ſuch Iſſue, Deviſe over in " Fee to *John Melling.*" It was objected, in that caſe the Limitation is expreſsly for Life, and in that reſpect ſtronger than *Wild*'s Caſe in 6 *Co.* 17. An Eſtate is deviſed to one for Life, and after his Death to his Iſſue or Child, having Iſſue at the Time; the Iſſue take by way of Remainder. In anſwer to which Objection, the Lord Chief Juſtice ſaid, that tho' theſe Words weigh the Intention that Way, yet they are ballanced by an apparent Intention that weighs as much on the other Side; which is, that as long as *Bernard* ſhould have Children the Land ſhould never go over to *John.* This differs from *Archer*'s Caſe, 1 *Co.* That Deviſe was for Life, and after to the Heir Male, and the Heirs of the Body of that Heir Male: There the Words of Limitation being grafted upon the Word *Heir*, it ſhews that the Word *Heir* was uſed as *Deſignatio Perſonæ*, and not for Limitation of the Eſtate; ſo is the Caſe of *Clerk* and *Day*, *Cro. Eliz.* 313. The Caſe is really *Cheek* and *Day*, and is entered on the Roll, *Hill.* 35 *E. Ro.* 467. The ſame Caſe is reported in *Owen* 148. *Moor* 593. and in *Roll. Abr.* 832. *K.* The Caſe was, *Joan Marſh* deviſed Lands to *Roſe* her Daughter for Life, " and if ſhe have Heir of her Body, then I " will that the Heir after my Daughter's Death ſhall have " the Land, and to the Heirs of their Body begotten; and " for Default of ſuch Iſſue, Remainder over." 'Tis ſaid in *Croke*, that it was firſt agreed by all the Juſtices, that a Deviſe to one and the Heir of his Body is an Eſtate-Tail, and ſhall go to all the Heirs of the Body. *Heir* is *Nomen collectivum*; ſo ſays 1 *Roll. Abr.* 832. *K.* according to *Popham* Chief Juſtice and *Fenner*; *ſed adjornatur. Moor*, who is a very good Reporter, ſays, it was adjudged ſhe had but an Eſtate for Life and the Inheritance in her Heir by Purchaſe, *&c.* reſting in Abeyance all her Life, and veſting in the Inſtant of her Death. When *Croke* reported this Caſe he was a young Man, and *Rolls* had not then begun to ſtudy the Law, and had this Caſe only by Hear-ſay. Judgment is not entered on the Roll; but *Moor* ſays it was adjudged; which is agreeable to my Lord *Hale*'s Manner of citing it, who ſays, and ſo is the Caſe of *Clerk* and *Day.* But this is not truly ſtated in any of the Books; *Moor* comes the neareſt to it as it is

Heir uſed as *Deſignatio Perſonæ.*

upon the Roll. The true State of the Caſe was, *M.* ſeiſed in Fee, deviſed Lands to her Daughter *Roſe* for Life, " and " if ſhe marry after my Death, and have any Heirs lawful- " ly begotten, I will that her Heir ſhall have the Lands " after my Daughter's Death, and the Heirs of ſuch Heir."

So that upon the whole, *Iſſue* is not properly a Word of Limitation, but may be taken either one Way or the other. In a Conveyance 'tis a Word of Purchaſe and not of Limitation; but in a Will 'tis governed and directed by the Intent of the Party. Here it is *Deſignatio Perſonæ.*

Ante p. 76.

3 D'Anv. 182. pl. 21. 1 Vent. 214, 225.

The great Caſe on the other Side is *King* and *Melling*, which was much inſiſted on, and was a Caſe of great Difficulty, but is now ſettled. But there is no Reaſon to carry it any farther. We are contending againſt the expreſs Intention of a Teſtator who gives the Eſtate for Life, to force him to deviſe ſuch an Eſtate as he never thought of, and to give it as we pleaſe, and to controvert and deſtroy a Will in all its Parts, and defeat all the Remainders. It is true that has been ſettled, and it is not proper *quieta movere.* But that Caſe by no Means comes up to this; there is no Limitation over to the Heirs of the Body of the Iſſue, or Iſſue of Iſſue, *&c.* If there had, their Opinion had been as ours; for *Hale* C. J. in *Vent.* 232. ballances the apparent Intention of the Teſtator to give it his Iſſue, againſt his apparent Intention to give it to *Barnard* for Life only: And *Hale* ſaid, the Intention of the Teſtator was the Law to expound the Teſtament.

When *Iſſue* ſhall give an Eſtate for Life only.

When Iſſue is *Deſignatio Perſonæ*, it can carry only an Eſtate for Life to him whoſe Iſſue are to take by ſuch Deſignation. *Taylor* verſus *Sayer*, *Cro. Eliz.* 742. Deviſe to the Wife for Life, and after her Deceaſe the ſame to the Iſſue; the Wife had Iſſue at that Time: and adjudged that ſhe had but an Eſtate for Life. There they all agreed, that if by the Deviſe to the Iſſue it ſhould be extended to all the Iſſues, they ſhould have it for Life only; and ſo is *Wild*'s Caſe 6 *Co.* 17. And in *King* and *Melling*, L. Ch. J. *Hale* ſaid, 'twas plain by the Intent of the Will, that *John* to whom it

Ante p. 76.

was given in Remainder, ſhould not take as long as *Barnard* had Iſſue by his ſecond Wife, which he very rightly ballances againſt the expreſs Deviſe to *Barnard* for Life.

It was objected, that an Eſtate-Tail ſhall be raiſed by Implication on the ſubſequent Words, *And if both my ſaid Siſters happen to die without Iſſue*, &c. *Remainder over.* There are an infinite Number of Caſes to prove that where a Man gives an Eſtate to one, and after his Death to his Iſſue; or, if he die without Iſſue, then to another; That is an Eſtate-Tail. But the Caſe of *Langley* and *Baldwyn* in *C. B.* and afterwards in *Canc.* and *Sutton* and *Paman* in *Scacc.* and afterwards carried into the Houſe of Lords, are chiefly relied on by the other Side: For, in *Langley* and *Baldwyn*, *John Langley* ſeiſed in Fee of a Meſſuage, deviſed it to his eldeſt Son *H.* for Life without committing Waſte, Remainder to *John* his Grandſon *ſans* Waſte, with Power to make a Jointure, Remainder to the firſt Son of *John* and the Heirs Male of his Body; and in Default of ſuch Heir, to the ſecond, third, fourth, fifth and ſixth Sons of the ſaid *J.* and the Heirs Male of their Bodies; (but no direct Limitation to all the Sons of *J.*) and if the ſaid *J.* happen to die without Iſſue Male of his Body, then to his ſecond Son *H.* with Remainders over. Here we muſt raiſe an Eſtate-Tail by Implication, tho' the expreſs Deviſe was not to all the Sons: For what was to become of the Eſtate after the Death of the ſixth Son without Iſſue? The Teſtator could not deſign it for his Heir at Law to take before the ſeventh or eighth Son; ſuch a Fraction cannot be ſuppoſed to have entered his Head: Therefore it was neceſſary to raiſe an Eſtate-Tail in *J.* by Implication, becauſe the Eſtate was undiſpoſed of; and the Intent of the Teſtator appears, that the Remainder Man ſhould not take as long as there was any Iſſue of *J.* And the Caſe of *Sutton* and *Paman* ſtands upon the ſame Reaſon; for there the Limitation was only to two Sons, and the third could not take. But in the Caſe before us, the Word *Iſſue* takes in all Iſſues; and the Iſſue of the Iſſue, all the Deſcendants.

Ante p. 66.

Ante p. 66.

Eq. Abr. 185. pl. 29. 1 Mod. Caſes 258.

Where

Where there is a Limitation for Life, and a Deviſe to all the Sons and the Heirs or Heirs Male of their Bodies; and for Want of ſuch Iſſue, a Deviſe over; theſe Words, *and for Want of ſuch Iſſue*, ſhall never raiſe an Eſtate-Tail by Implication in him to whom the Limitation was for Life.

Eq. Abr. 108. p. 2. 1 Vern. 79, 167, 344.

I have ſeen the Caſe of *Popham* and *Banfield*, which is miſreported in *Salk.* 236. According to him it was a Deviſe to *A.* for Life, Remainder to the firſt Son of *A.* in Tail Male. and ſo on to the tenth Son in Tail Male; but he has dropt the material Words, *To all and every Son and Sons of his Body*; for it was not to the tenth Son only as he puts it; and if *A.* dies without Iſſue Male of his Body, Remainder over; and by a Codicil annexed he recited, that whereas he had given an Eſtate-Tail to *A.* &c. And it was objected, that there the Teſtator's Intent appeared, that *A.* ſhould have an Eſtate-Tail, and *A.* might have poſthumous Children, and more than ten Sons; *ſed non allocatur.* For where a particular Eſtate is expreſsly deviſed, we will not by any ſubſequent Clauſe collect a contrary Intent inconſiſtent with the firſt by Implication: And therefore they conſtrued *dying without Iſſue Male*, dying without ſuch Iſſue Male.

The Caſe in Truth was, a Deviſe was made to *A.* for Life, Remainder to all and every Son and Sons of his Body, who would be all intitled to take before the Remainder Man. So that here being a Deviſe to all the Sons, there was no Occaſion to conſtrue it an Eſtate-Tail, in order to fulfill the Intention of the Teſtator; as there was in the Caſes beforementioned of *Langley* and *Baldwyn*, and *Sutton* and *Paman*, or *Trencham*'s Caſe, in *Dyer* 171. which was cited by L. Ch. J. *Hale*, in the Caſe of *King* and *Melling*, which was a Deviſe to a Man and the Heirs Male of his Body, and if he die without Iſſue, &c. and adjudged that theſe Words, *and if he die without Iſſue*, did not make a general Tail. *Hale* there ſaid, that by *Iſſue* muſt be intended *ſuch Iſſue.*

The Words in the principal Caſe cannot be extended farther than to expreſs an Eſtate for Life, the Intent of the

Teſtator appearing as ſtrong as in the Caſe of *Backhouſe* and *Wells*; there indeed the Words are *for Life only*; and here are Words that are tantamount, the Paſſages being compared together, the Intent of the Teſtator appears as ſtrongly. Ante p. 66.

It was another Objection, that Iſſue in this Cauſe cannot be interpreted as *Deſignatio Perſonæ*, becauſe it does not appear whether the Iſſue was to be Son or Grandſon, or of what Sex, Male or Female; and if it is not an Eſtate-Tail, it is void for the Incertainty which Iſſue ſhould take, according to the Caſe in *Cro. Eliz.* 742. Where a Man deviſed to his Wife for Life, and after her Deceaſe to his Iſſue; and there was a Son and a Daughter living when the Mother died: This was held a void Deviſe for the Incertainty which the Teſtator intended ſhould take, but this has been denied to be Law and adjudged ſo lately in *C. B.* Objection againſt *Iſſue* being *Deſignatio Perſonæ*; anſwered.

In Anſwer to this, there was no Word in the Caſe of *Backhouſe* and *Wells*, and *Loddington* and *Kime*, that could confine Iſſue to a particular Perſon, more than in the preſent Caſe: It does indeed as to Sex, and there is the Word *his*, viz. *his Heirs for ever*. It has been ſaid, that if an Eſtate be given to a Man and his Iſſue, 'tis void for the Incertainty, becauſe not appearing whether Male or Female; but it has been held and determined ſince not to be Law, and that it is well enough in a Deviſe. The Caſe of *Backhouſe* and *Wells* is a ſtrong Authority. Here the Intent of the Teſtator appears as plainly as there; the Words of Limitation annexed to the Word *Iſſue*, ſhew it to be *Deſcriptio Perſonæ*. Ante p. 65, 67, 68.

The Siſters take only an Eſtate for Life.

There was another Queſtion made in the Caſe: Whether there were croſs Remainders. But as we are of Opinion, this is only an Eſtate for Life in the Siſters, there is no Occaſion to ſpeak to that Point.

Upon the whole, we are all of Opinion, that the Judgment below is wrong, and muſt be reverſed.

This Cauſe came afterwards into the Houſe of Lords by Writ of Error, and all the Judges were ordered to attend, and were heard; and the Opinion of the Judges being aſked, three Judges, *viz.* Chief Juſtice *Eyre*, Chief Baron *Pengelly*, and Mr. Juſtice *Forteſcue A.* (now a Judge of the Common Pleas) argued for the Defendants againſt all the reſt of the Judges; and the Subſtance of Mr. Juſtice *Forteſcue A.*'s Argument was as follows:

Mr. Juſtice *Forteſcue A.*'s Argument.

When this Caſe was firſt argued, I had the Honour to ſit in the King's Bench, and I was then of Opinion, and ſo was Juſtice *Powis*, who ſat with me, that this was an Eſtate-Tail; and I continue of the ſame Opinion ſtill.

I beg Leave to ſay, that there is a great deal of Difference between the Conſtruction of a Will and that of a Deed; and the true Difference is this, tho' both of them are to be conſtrued according to the Intention of the Parties; yet in a Will the Teſtator being ſuppoſed to be *inops Concilii*, is excuſed from uſing technical Words and Law Phraſes, and has the Liberty to expreſs himſelf in his own Language; and therefore if he ſhould uſe a Word not proper in Law, if his true Meaning can be ſeen thro' it, the Law allows it; which it would not do in a Deed.

The primary Intention of the Teſtator in the Frame of this Will was, to ſecure the Eſtate to his two Siſters; the ſecondary Intention was, that it ſhould go to their Iſſue upon their Death; then he ſeems to have conſidered the three diſtinct Caſes that might happen on three Contingencies, and to have made a diſtinct Proviſion for each.

(1.) If either of his Siſters dies and leaves Iſſue, then to ſuch Iſſue as to the Mother's Share.

(2.) Or elſe, *i. e.* otherwiſe, if one of the Siſters dies, and does not leave Iſſue, then to the Survivor or Survivors of them, that is, the Siſters, not the Iſſue, for he is all this while talking of his Siſters dying, and not of any Iſſue dying.

(3.) And then if both my ſaid Siſters die without Iſſue, as aforeſaid, then to the Leſſor of the Plaintiff.

Now the main Doubt in this Caſe ariſes upon the Words, "Or elſe in Truſt for the Survivor or Survivors of them, "and their reſpective Iſſue or Iſſues".

I would obſerve, that if this Survivorſhip was intended to relate to the Iſſue, this ſhould not have been a diſtinct Clauſe, but Part of the firſt Clauſe; and therefore in the Conſtruction and Argument, they have ſubſtituted the Word *and* inſtead of *or*, and quite rejected the Word *elſe*. Now the Word *elſe* and the *Repetition of the Words* in *Truſt*, ſhews this not to be a carrying on of the former Proviſion, but a diſtinct Clauſe, and a diſtinct Proviſion upon a different Caſe; and the Words *or elſe*, following the Caſe put, if either Siſter dying leaving Iſſue, are equivalent to the Words *or otherwiſe*, as much as to ſay, if that be not ſo, *i. e.* if either of my Siſters die not leaving Iſſue, then in Truſt for the Survivor of my Siſters; this makes the Senſe clear, and the Proviſion for the Iſſue proper, allowing only one ſingle Word *Survivors*, to be ſuperfluous. It amounts to this; if one Siſter dies and leaves Iſſue, to be in Truſt for ſuch Iſſue, as to the Mother's Part; but if ſhe dies and leaves no Iſſue, then in Truſt for the ſurviving Siſter, and her Iſſue; *This is a common and natural Proviſion*, which veſts an Eſtate-Tail in the Siſters, to deſcend to their Iſſue, not promiſcuouſly, as in the other Conſtruction, but to all the Iſſue in a courſe of Deſcent, to all future Generations.

Now with Submiſſion, here is a *double Eſtate-Tail*; by expreſs Words, and by neceſſary Implication alſo.

The

The Word *Iſſue* in a Will where there is no Iſſue in Being, as in this Caſe, *is a Word of Limitation, and is Nomen collectivum*, and takes in the whole Generation; nay it is more collective than Heirs of the Body; for that ſignifies only Heirs in Succeſſion, but the Word *Iſſue* ſignifies all the Iſſue at once, and every Iſſue in Succeſſion together; *not but that the Word* Iſſue *if qualified and reſtrained*, may be a kind of Purchaſe, as to the firſt Iſſue, or eldeſt Iſſue, or Iſſue Female, as in the Statute of *H.* 8. 1. for limiting the Succeſſion of the Crown; there the Iſſue *take by Purchaſe, as meaning a ſingle Perſon.* So that giving the Eſtate to his two Siſters and to their Iſſue, if the Teſtator had ſtop'd there, is clearly an Eſtate-Tail.

2*dly*, By neceſſary Implication, in the ſubſequent Words, *if both my ſaid Siſters die without Iſſue*; ſo is the Caſe of *The King* and *Melling*, 1 *Vent.* 214, 225. Lord *Hale.* There the Words were, *and for want of ſuch Iſſue*, which Words, ſays he, make an Eſtate-Tail; and there he quotes *Burley*'s Caſe 43 *Eliz.* a Deviſe for Life to *B.* Remainder to the *next Heir Male*, in the ſingular Number, and for *default of ſuch Heir Male*, to remain over, this was held to be an Eſtate-Tail; which is a ſtrong Caſe.

The next Caſe I ſhall quote is a ſtronger than that, and indeed a Caſe in Point; *i. e. Sonday*'s Caſe, 9 *Co.* 128. in theſe Words, after his Mother's Death, he deviſes, " That " his Son *William* ſhall have the Land, and if he have a Male " Iſſue, his Son to have it after his Death, and if he have " no Iſſue Male, then to the next Son, and ſo on", this was held to be an Eſtate-Tail, becauſe the Words were *tantamount* to the Words *if he die without Iſſue.*

The next Caſe I ſhall mention is, *Seagrave* and *Miller*, which was firſt in the Common Pleas, and then came into the King's Bench, *Paſch.* 12 *Geo.* 1. that was a Deviſe to *Edmund Miller* and *Robert Shanock*, " during their natural " Lives, equally to be divided between them, and after their " deceaſe to the next Heirs Male of their Bodies, but in caſe

" either of them die without ſuch Iſſue, then I deviſe " the ſame unto the other of them, and after his deceaſe " to the Heirs Male of his Body, and for want of ſuch Iſ- " ſue of both of them, then he deviſed over to others, with " a Proviſo that if any of the Deviſees cut down Timber, " unleſs for neceſſary Botes, they ſhould forfeit their Eſtates. This ſeems to be our very Caſe; it was held to be an Eſtate-Tail in *Miller* and *Shanock*, notwithſtanding the Eſtate was limited to their next Heirs Male; this was the unanimous Reſolution of the Court of Common Pleas, when the Lord Chancellor preſided there, and was, as I believe, to the Satisfaction of all *Weſtminſter-Hall*; and when this Cauſe was brought into the King's Bench by Writ of Error, that Court ſeemed to be of the ſame Opinion, but as to the Points of Pleading, being in a *Formedon*, theſe were debated, but no Queſtion made as to the Limitation of Eſtate. But then it is ſaid, here are other Words added, " If both my ſaid " Siſters die without Iſſue, and their Iſſue or Iſſues die " without Iſſue, then over", which will influence this Caſe. I think not, for they are a heap of Words without any Meaning, and indeed are Nonſenſe; for if both the Siſters die without Iſſue, how can they have Iſſue to die without Iſſue, when they are ſuppoſed to have none.

But then it is objected, that here is an expreſs Eſtate for Life given to the two Siſters; this is of no Weight, for an Eſtate for Life is neceſſarily underſtood, tho' not expreſſed; *A.* grants Land to *J. S.* the Law interprets it to be for Life, as long as he is *J. S.* but there are many Caſes to this Purpoſe; in *King* and *Melling*, a Deviſe to his Son for his natural Life, and after his Deceaſe, to ſuch Iſſue as he ſhould have of the Body of his ſecond Wife, held to be an Eſtate-Tail, tho' there is an expreſs Eſtate for Life.

And my Lord *Hale* founded his Opinion on ſeveral Caſes, but in particular the Caſe of *Hanſey* and *Lowther*, which was a Deviſe to his firſt Son for Life, and after his Deceaſe to the Heirs Male of his Body, in the ſingular Number, this was held to be an Eſtate-Tail.

And indeed to give an expreſs Eſtate for Life in the Affirmative, does not infer a Negative, without negative Words, or Words amounting to negative Words, as the Word *only*; that indeed infers a Negative, that he ſhall have no larger Eſtate; but to give an Eſtate for Life, is very conſiſtent with an Eſtate-Tail; to ſpeak accurately, Tenant in Tail has no more than an Eſtate for Life, and therefore *Littleton* ſays, that if Tenant in Tail grant *totum ſtatum ſuum*, nothing paſſes but an Eſtate for Life, *i. e.* he has an Eſtate for Life to alien and diſpoſe of, and has the Inheritance to deſcend to his Iſſue, which is *in auter droit*, only, *i. e.* in Right of his Iſſue.

Another Objection is, that here are the Words *without committing Waſte*, which is prohibiting them to commit Waſte. *Anſwer:* This is ſo far from arguing they have no Eſtate-Tail, that it ſuppoſes they have an Eſtate-Tail, for it is to no purpoſe to prohibit Tenant for Life from committing Waſte, becauſe he cannot commit Waſte, but to prohibit Tenant in Tail, in whoſe Power it is to commit Waſte, the Teſtator thought might be reaſonable.

And this is the Reaſon in *Sonday*'s Caſe expreſly, where there was a Proviſo not to alien or mortgage. And in the Caſe of *Miller* and *Seagrave*, which I mentioned before, there is an expreſs Proviſo, not to commit Waſte in Timber particularly.

Another Objection was, that here is a particular Power to raiſe Money by digging Coal: This is capable of receiving the ſame Anſwer as prohibiting to commit Waſte, but I think another Anſwer may be given to it, which makes it reaſonable, and that is, that if either Siſter ſhould pay the whole 500 *l.* it was proper that ſhe ſhould be enabled to raiſe it, not only out of her own Moiety, but out of her Siſter's too, for the other Siſter might elſe ſue out a Writ of Partition, and defeat her from raiſing any Thing out of her Part, or if ſhe did not, the other Siſter might take a

Share of whatever Coals ſhould be got by her who advanced the Money; therefore ſuch *Power proper.*

But now, I would conſider this Caſe in their Way of Conſtruction: Suppoſing the Word *Survivors* ſhould be referred to *Iſſue*, then they would have *Iſſue* to be a Word of Purchaſe; and *the Survivors of that Iſſue* to be Words of Limitation; and the Caſes of *Loddington* and *Kime*, 3 *Lev.* 431. and *Backhouſe* and *Wells*, have been quoted; to which I ſhall give a diſtinct Anſwer. As to the firſt of theſe Caſes, that was a Deviſe to *A.* for Life; and in caſe he ſhall have Iſſue Male, to ſuch Iſſue Male and his Heirs for ever: This is plainly the Deſcription of a ſingle Perſon, and is the ſame as if he had ſaid, to his *firſt Iſſue Male*, or to his *firſt Son* and his Heirs; which to be ſure is good. But here it is to the *Iſſue* in general Terms, and no particular Iſſue deſcribed; and repeating the Word *Iſſue*, or *the Survivors of the Iſſue*, will not mend the Matter; for the Survivors of the Iſſue, are all compriſed in the Word *Iſſue.*

As to the Caſe of *Backhouſe* and *Wells*, that does not at all come up to this Caſe; *Trin.* 11 *Ann.* in *B. R. Thomas Backhouſe* deviſed to *J. B.* an Eſtate for and during his Life only; and from and after his Deceaſe, then to the Iſſue Male of his Body, and to the Heirs Male of the Body of ſuch Iſſue; now the material Difference here is, that an Eſtate for *Life only* is given, which is in the Nature of a Negative, and ſignifies that he ſhould have no other Eſtate but for Life; which ſevers the Eſtate for Life from any Inheritance; and is as much as if he had ſaid, he ſhould have the Eſtate for his Life, but not the Inheritance; the Conſequence of which is, that the Iſſue Male muſt take by Purchaſe; and the Court relied upon this Word *only*; and this was ſupported by a ſtrong Caſe quoted by my Lord *Hale* in the Caſe of *King* and *Melling*, which is in *Roll. Abr.* 837. That was a Deviſe to his eldeſt Son for Life, *& non aliter*, and after his Deceaſe to the Sons of his Body; this was held, ſays my L. Ch. J. *Hale*, to be an Eſtate for Life only by reaſon of the Words *non aliter*; this is a very great Authority.

Beſides,

Beſides, in thoſe Caſes, the Words grafted upon the Word *Iſſue*, are *Heirs Male*; but there is no Caſe in the Law that I know of, where Iſſue is grafted upon the Word *Iſſue*; becauſe they mean the ſame Thing; ſo that nothing is varied, no Deſcent or Succeſſion altered, as there is in thoſe Caſes: But this is worſe ſtill, for it is not to the *Iſſue of the Iſſue* of the Siſters; but to *their Iſſue, or the Survivors or Survivor of them*; ſo that the Words grafted are more reſtrained than the firſt Word *Iſſue*; and the Words of Limitation do not go to all the Iſſue, but to ſome only.

Again, the Word *Iſſue* is tantamount to *Heirs of the Body*; then it will run thus, "I give my Eſtate to my two Siſters "and the Heirs of their Bodies, and the Heirs of the Body "of ſuch Heirs;" then this is manifeſtly an Eſtate-Tail, and ſo adjudged in *Shelly*'s Caſe; becauſe here is no Alteration in the Deſcent or Succeſſion, but is only repeating the ſame Words twice; which laſt Words are compriſed in the firſt.

Now I come to ſhew the many Improprieties and odd Limitations, and ſome great Abſurdities in referring Survivors to the Iſſue.

Firſt, Here is a Proviſion for Iſſue in the ſecond Caſe I put, when the Caſe ſuppoſes there is no Iſſue, *i. e.* "If ei-"ther Siſter dies without Iſſue, then to the Survivors of ſuch "Iſſue:" Which is downright Nonſenſe; and this Caſe wholly unprovided for.

Secondly, Here is the Word *and* ſubſtituted in the Place of *or*; and another material Word, not a Word of Form, *elſe*, is totally rejected, tho' a very ſenſible Word, and makes the ſecond Caſe put before.

Thirdly, The Teſtator by the firſt Word *Iſſue*, is to mean a particular *Perſon or Perſons*; and by the ſame Word *Iſſue* in the ſame Line, is to mean *all the Iſſue* to all future Ages;

one would think this could never enter into the Head of this Man.

Fourthly, But there is ſtill ſomething worſe; and that is, that the Children of both Siſters, in this way of Conſtruction, tho' never ſo many, Male and Female (all jumbled together) are to take as Joint-tenants, with ſeveral Inheritances to their Iſſue; this is very uncommon, and never happens from the Deſign or Intention of any one. Every Marriage Settlement now-a-days bears Witneſs againſt ſuch a Limitation; for there the common and every Day's Limitation is to the Daughters; with an *expreſs Proviſion* that they take as Tenants in Common, and not as Joint-Tenants.

It is more unlikely ſtill, becauſe he has juſt before prevented a Survivorſhip between his Siſters; for he has given to them equally to be divided between them. Is it reaſonable after this to ſuppoſe, that he ſhould in the very next Words ſet up a Survivorſhip amongſt the *Children*, which he had expreſsly excluded between the *Mothers?* If Iſſue take by Purchaſe, all muſt take, Sons and Daughters, nay Grandchildren too; for they are Iſſue capable to take by Purchaſe. Now it muſt be agreed, that this is very unnatural, nor could the Teſtator mean to divide and ſubdivide, and cut up the Eſtate into ſo many Parts, as in this Manner it muſt be.

To conclude: In the Conſtruction I put upon this Will, by referring the Word *Survivors* to the two Siſters, there is but one Word of Redundancy, which naturally follows in the Train of Words both in Conveyances and Wills, *currente Calamo*; but here is no Want of a proper Word, for here is the Word *Survivor*; nor is any Word rejected in this Conſtruction; and this makes the Will to have a proper and ſenſible Meaning, and makes it an Eſtate-Tail in the Siſters.

And as to the Objection that it ſhould refer to the laſt Antecedent. *Anſwer:* That is not the true Rule, but it is *Niſi Sententia impediat*; and the laſt Antecedent is the whole Clauſe.

Before the Lords gave Judgment, the Learned Biſhop of *Chicheſter*, Dr. *Hare*, ſtood up and ſaid he did not pretend to underſtand the Niceties of the Law, but this Queſtion ſeem'd to him very much to depend upon a grammatical Conſtruction of the Words of the Will, and perceived that the three Judges that differed from the reſt, ſeemed to argue from the Grammar of it, and that he was of Opinion that according to grammatical Conſtruction, he ſhould rather think that Survivor or Survivors, ſhould be moſt properly referred to the Siſters rather than to the Iſſue; and thereupon the Houſe of Lords, *Nemine contradicente*, gave Judgment according to the Opinion of the ſaid three Judges, and reverſed the Judgment given by the King's Bench.

16 *March* 4 *Georgii* I.

At the Aſſizes at Rocheſter *in* KENT.

The King verſus *Wiſeman.*

THIS was an Indictment for committing of Sodomy in *Ano*, with a Girl of eleven Years of Age, which was tried before Mr. Juſtice *Probyn*, at *Rocheſter* in *Kent*; the Fact was committed by the Maſter of a Work-houſe at *Maidſtone* in *Kent*, with one of the Girls then there with him. The Defendant was tried and convicted on this Indictment at the Aſſizes held for *Kent*, 16 *March* 4 *Geo.* 1. The Indictment was as follows:

Indictment for Sodomy in *Ano* of a Girl.

Majority of all the Judges held it was Sodomy both at the Common and Civil Law.

" Juratores pro Domino Rege ſuper Sacramentum ſuum Kan' ff.
" præſentant, quod Ricardus Wiſeman nuper de Parochia de
" Maidſtone in Com. Kant. Laborator, Deum præ Oculis
" ſuis non habens, nec Naturæ Ordinem reſpiciens, ſed In-
" ſtigatione diabolica motus & ſeductus, primo Die Januarii
" Anno Regni Domini Georgii ſecundi, nunc Regis Magnæ
" Britanniæ, &c. quarto, vi & armis, &c. apud Paro-
" chiam prædictam in Comitatu prædicto, in quadam Ro-
" mea in Domo & Occupatione Pauperum, anglice vocat'
" *The Work-houſe*, adtunc ſcituat' in Parochia prædicta, in
" & ſuper quandam Janam Mills, Spr. adtunc Virginem
" ætat. undecim Annorum, in Pace Dei & dicti Domini
" Regis adtunc & ibidem exiſtentem, Violenter & Felonice
" Inſultum fecit, & adtunc & ibidem eandem Janam Mills
" in Romea prædicta nequiter, diabolice, felonice & contra
" Ordinem Naturæ carnaliter cognovit, & Rem veneream
" in Ano, anglice *the Fundament*, ipſius Janæ Mills adtunc
" & ibidem habuit, eamque Janam Mills adtunc & ibidem
" nequiter, diabolice, felonice & contra Ordinem Naturæ

" in

" in dicto Ano ipſius Janæ Mills adtunc & ibidem carnaliter " cognovit, Peccatumque illud ſodomiticum, deteſtabile & " abominabile, anglice vocat' *Buggery*, inter Chriſtianos non " nominandum, adtunc & ibidem cum eadem Jana Mills " nequiter, diabolice, felonice & contra Ordinem Naturæ " commiſit & perpetravit; in magnam Dei omnipotentis " Diſplicentiam, & totius Humani Generis Dedecus, contra " Pacem dicti Domini Regis, Coronam & Dignitates ſuas, " &c. necnon contra Formam Statuti in hujuſmodi Caſu " edit' & provis'." Vide *Co. Ent.* 351, 352.

This being a particular Caſe, tho' as moſt thought, not a very difficult one, the Judge reprieved the Priſoner, in order to have the Opinion of all the Judges, on this Offence, whether it was Buggery within the Statute or not.

The Judges met once or twice on this Occaſion, and the Caſe was argued by them, and a few were of Opinion that this was not expreſs Buggery within our Law; though as Juſtice *Forteſcue A.* remembered, there was a great Majority, that were of Opinion it was plain Buggery by our Law; but yet, becauſe two or three Judges held out, there was no further Meeting, and conſequently no unanimous Opinion given.

The Judges not unanimous.

But Juſtice *Forteſcue A.* was exceeding ſorry, that ſuch a groſs Offence ſhould eſcape without any Puniſhment in *England*; when it is a Crime puniſhable with Death and burning at a Stake, all over the World beſides.

The Earl of *Macclesfield* conſulted by the Reporter.

The Earl's Opinion that it was Sodomy.

It being ſo horrid and great a Crime, and that no Colour ſhould be given to ſuch an Offence, Juſtice *Forteſcue A.* wrote to the Earl of *Macclesfield*, then Chancellor of *Great Britain*, concerning this Matter; and his Anſwer was by way of Letter, that he wondered at the Variety of Opinions; that he had not the leaſt heſitation in agreeing it to be plain Sodomy, that he could not think of one Objection, to which he ſhould be able to give the Appearance of an Argument; that it is a Crime exactly of the ſame Nature, as well as it is the ſame Action, as if committed upon a

Male, the Difference of the Subject only makes it more inexcuſable, and it is within the Letter of the Act of Parliament, as well as within the Meaning, that it ſeems little to the Purpoſe to ſay, that poſſibly the Law-makers might not think of this Crime; whether they did or not, appears not; the Words reach it, and the Reaſon of the Law reaches it; and when a Crime is forbid in general, it is not neceſſary that every Species of it ſhould be under Conſideration, unleſs ſuch Species ſhould be leſs Criminal. with aggravation.

The Word *Buggery* made uſe of, is not a Term of Art appropriated to the Common Law, but the Puniſhment is provided, becauſe of its being a Vice ſo deteſtable and abominable, and againſt Nature. Buggery with the moſt filthy, or the moſt dreadful Creature, is Buggery, tho' never ſo unlikely to be committed, and though the Law-givers had thought it impoſſible it ever ſhould be committed. Beſides the unnatural Abuſe of a Woman, ſeems worſe that than of a Man or a Beaſt; for it ſeems a more direct Affront to the Author of Nature, and a more inſolent expreſſion of Contempt of his Wiſdom, condemning the Proviſion made by him, and defying both it and him.

His Lordſhip cited two or three Caſes in the Civil Law, which are very much to the Purpoſe; one was in a Treatiſe of *Bermondus*, being a Comment upon the *Lateran* Council, *De Publicis Concubinariis*; when he comes to the laſt of thoſe Branches, into which he had divided Fornication, as that in a large Senſe takes in all unlawful Mixtures, he expreſſes himſelf thus, being a Canoniſt, " De finali Specie " Fornicationis ſupereſt tractemus, viz. de Peccato contra " Naturam, quod dicitur, cum humana Natura, & Crea- " tura cum alia diverſa Specie, vel cum alia Simili in Specie " ejuſdem tamen Sexus, nefarie atque damnabiliter Com- " mittitur, vel etiam Peccatum contra Naturam dicitur, ſi " quis alio modo carnaliter cognoſcit Mulierem quam a Na- " tura ordinatum ſit. Addite etiam quod per delictum So- " domiticum, Commiſſum cum Maſculo, vel Fœminâ extra " debitum Naturæ nulla contrahitur Affinitas cum Parenti- The Opinion of a Canoniſt.

" bus Maſculi vel Feminæ. Iſtud appellatur Peccatum contra " Naturam, quia Deus, qui eſt Summum Bonum, non ſo- " lum Offenditur, ſed etiam Natura; & quia Mulieres a " Natura conſtitutæ fuerunt, ut partus ederent, & ad hoc " inventa ſunt Matrimonia, quæ fieri non poſſunt in Coitu " contra Naturam; & ſic Deus & ipſa Natura Violatur, " quia non ſic fecit homines ut eo modo libidine uterentur. " Apud Deum tale Peccatum reputatur gravius homicidio, " eo quia homicida unum hominem tantum, Sodomita au- " tem totum genus humanum delere videtur.

Juſtice *Forteſcue A.* ſaid he had conſidered fully of this Caſe, and was clear of Opinion it was Buggery within the Law of *England.*

The Etymology of the Name of this Crime, *Torriano*'s Dictionary.

Buggery is an *Italian* Word, and comes from *Bugeriare* to commit unnatural Sin. See *Torriano*'s Dictionary, much like our Indictment, which expreſſes it by, " Crimen inter " Chriſtianos non Nominandum, & contra ordinationem " Creatoris & Naturæ ordinem. This Deſcription is very

King *Edgar*'s Law.

antient, for in the *Saxon* Laws of King *Edgar* 77. " Siquis " turpiter contra naturam & bonam Dei creationem, " aliqualiter ſe inquinaverit, lugeat quamdiu vixerit" *Vide*

The *Greek*

Wilkins Saxon Laws 81, 93. Among the *Greeks* Παιδεραστία, was the genteel Word for Buggery, *i. e.* Love of Boys, and they made Uſe of Girls too in that way, for the *Greek* Word Παις ſignifies *Puella*, a Girl, as well as *Puer* a Boy;

and *Latin* Names for it.

and beſides this Word, *Pederaſtia & Pederaſtes*, the *Latins* had another Word, which ſeems to hint at this very Caſe, which is *Venus poſtica.*

The Caſe within the Words of Stat. 25 *H.* 8. *c.* 6.

This Caſe is within the Words as well as Meaning of the Statute of 25 *H.* 8. *cap.* 6. which begins thus, becauſe there is not a ſufficient Puniſhment for the deteſtable Sin of Buggery, committed with Mankind or Beaſt, and then it takes away Clergy from this Offence. Now every one ſees the material Word here is not *Man* but *Mankind*, which has a very different Meaning; for, the Word *Mankind* takes in, all the Species of Man, whether Male or Female, Boys or Girls. The fifth Epode of *Horace*, it begins thus,

At o Deorum, quicquid in cœlo regit, terras & humanum genus; can any one think *Horace* did not mean by *humanum genus*, Women and Girls, as well as Men and Boys. *Mankind* comes from the old *Engliſh Saxon* Word Mancyn, *Mancyn, humanum genus*, and ſignifies all the Species or Progeny of Man. *Womankind* is a *Catachreſis*, an abuſe of the Word, and ſeldom uſed; for Woman comes from the *Engliſh Saxon* Word, Wiman, in the *Saxon*, i. e. *Wife*, *Mulier*, that is, *homo Fœmina*, and ſometimes it is by the *Saxons* derived from Þamb *or* Þombe-Man, Wamb *or* Wombe-Man, *i. e. homo uteratus*, or *utero præditus*. Vide *Somner's Dict.* This is only a Species of Sodomy, and a Deſcription only, not a Definition. Sodomy is the Genus, *rem veneream habere in Ano* with a Man is only a Species, and with a Woman, is another Species, and ſo with a Boy or Girl, is another Species, and with a Beaſt another Species.

Etymology of the Word *Mankind*, and *Womankind*;

It is called in the *Mirror*, 252. *une Peche mortelle encontre le Roy de Ciel*, and ſaid to be worſe than raviſhing a Mother; and the Puniſhment in the Time of the *Saxons* was burying them alive; and that Book calls it High Treaſon.

How puniſhed by the *Saxons*.

In *Cowel's Interpreter*, Buggery is defined to be *carnalis Copulatio contra Naturam. Fitz. Nat. Brev.* 269. *b. Finch's Law*, *p.* 219. Sodomy is a carnal Copulation againſt Nature, *viz.* of a Man or Woman, in the ſame Sex, or of either of them with Beaſts. *Stafford's* Caſe *Cum Puero*, vide *Co. Ent.* 352.

3 *Inſt.* 58. *Amor Puerorum* is a Species of Buggery, and yet they are not Men ſtrictly ſpeaking. *De Maſculorum Stupris, & de Sodomitis*, vide *Codex Leg. Antiquar. Leg. Wiſigoth.* 71, 72.

Among King *Edgar's* Laws there is a very particular one to this Purpoſe: *Si quis velit cum Uxore* unphrlice *coire*; it is rendered by *Lambard* (vide *Wilkins*) in Latin, *injuſte*, but in the original *Saxon* it ſignifies, impiouſly, ungodly, and wrongfully to play the Lecher; this can mean no other than Venery *in Ano*. *Edgar* 92. *ſ.* 35. *Lambard* renders it

Maſculus

Maſculus cum Maſculo, but *Wilkins* is *cum alio*; which is nearer the Original.

Swinburn, of Wills, is very poſitive and plain; *Sodomia autem dicitur, non ſolum illud nefandum Peccatum inter Maſculos, ſed etiam Flagitium illud contra Naturam cum Fœmina; & hæc Opinio communis eſt. p. 96.* There are ſome other Caſes in the Civil Law much to this Purpoſe.

Doctor *Strahan*'s Opinion.

Juſtice *Forteſcue A.* had the Curioſity to write to Dr. *Strahan*, one of the moſt learned Doctors of the Civil Law, the Author of *The Civil Law*; and he gave his Opinion in Writing in theſe Words, " I take it to be Sodomy in our " Law, as well where the Act is committed by a Man upon " a Woman, as where it is committed by a Male upon a " Male; the Crime is look'd upon to be equally unnatural " in both Caſes, and the Actors in both Caſes are ſubject to " the ſame Puniſhment. This I take to be the received " Opinion in our Law."

And Juſtice *Forteſcue A.* ſaid, he would appeal to all the Lawyers in *England*, whether the Woman in this Caſe, is not as much a Pathick, and has done the ſelf-ſame Thing *in Ano*, as in the Caſe of a Man; and whether the Woman in one Caſe is not indictable as well as the Man in the other, being the ſame Crime and ſame Fact, but rather the greater Offence, becauſe it has greater Aggravations, as there is no Temptation nor Sollicitation from Nature, and a Woman at hand.

Other Authorities from the Civil Law.

" Julii Clari Sententiarum Lib. 5. S. Sodomia, p. 403. " Num. 2. Haud dubium eſt omnino, quod etiam cum " Fœminâ contrahatur Sodomia & punitur. Et hæc eſt " communis Opinio, ut atteſtatur Vivius, in Lib. Comm. " Opin. in verbo Sodomiæ delictum. Et ſecundum hanc " Opinionem ſæpe Judicatum fuit per Senatum, & Com- " buſtæ tam ipſæ Mulieres, quam viri, qui ad eas (præpo- " ſterâ venere) acceſſerant. Refert etiam Anton Gomez, " ſuper L. 80. Tauri, Num. 33. quod in oppido Tala-

" veræ fuit Combuſtus quidam, qui propriam Uxorem con-
" tra Naturam carnaliter cognoverat.

Gomez, p. 563. in Legem 80. Tauri, Num. 33. " Et
" adde quod idem eſt, ſi Vir habet Acceſſum ad Uxorem
" propriam, vel ad aliam quamlibet Mulierem, per Vas ex-
" terius contra Naturam: Quia Ambo puniuntur prædicta
" Pœna; ita aperte probant prædicta Jura, & eorum Ratio.

" Et iſtum Caſum vidi de Facto in Oppido de Talavera,
" ubi quidam Advena inſecutus ab Uxore, quia ibi ſecun-
" do nupſerat, captus fuit: & talis Uxor accuſavit eum,
" quod nedum bis nupſit, ſed etiam quod cum eâ habuit
" Acceſſum contra Naturam per Vas exterius, ipſa invita &
" reſiſtente; & tandem ipſe confeſſus eſt Delictum, & fuit
" combuſtus & concrematus."

Menochius De arbitrariis Judicum Quæſtionibus, Lib. 2. Cent. 3. Caſe 286. Num. 33. p. 544. " Quartus Coitus
" contra Naturam eſt ille, qui dicitur contra Naturam ipſius
" Sexus. Ut eſt quando Maſculus Fœminam præpoſterâ
" Venere cognoſcit: Hic enim Coitus dicitur contra Natu-
" ram uſus ipſius Sexus, & ſic a noſtris ſimpliciter appella-
" tur Coitus contra Naturam. Hoc etiam dici poteſt pro-
" prie Crimen Sodomiæ, & ita ſæpiſſime judicaſſe Senatum
" noſtrum Mediolanenſem.

DE
Term. Paſch.

6 *Annæ Reginæ.*

In the KING'S BENCH.

The Queen verſus *Read.*

Indictment for printing and publiſhing a Libel intitled *The fifteen Plagues of a Maidenhead.*

THIS was an Indictment in *London*, againſt the Defendant, for printing a Laſcivious and obſcene Libel, intitled *The fifteen Plagues of a Maidenhead.* It was tried before the Lord Chief Juſtice *Holt*, and the Defendant was convicted; and it was moved in Arreſt of Judgment, that this Offence was proper for Eccleſiaſtical Conuſance, and no Offence at Common Law; for it is only, that he deſigning to diſturb the publick Peace, publiſhed Bawdy. This is only general Satyr, expoſing the Folly of young People, and expoſes Fornication: An Indictment lies for Blaſphemy but not for Obſcenity. It was urged further that this could not be a Libel, becauſe it was not againſt any particular Perſon or Perſons, as is the Caſe *De libellis famoſis*, 5 *Co.* 125.

Whether a Perſon certain muſt be named, *&c.* to conſtitute the Offence of Libelling.

Raymond quoted *The King* verſus *Orm and Nutt*, *Trin.* 4 *W.* 3. which was an Indictment for printing a falſe and ſcandalous Libel, againſt diverſe Subjects to the Jurors unknown, and to defame them; held to be no Libel, becauſe no particular Perſon was named. So *The Queen* and *Lady Pearcehouſe*, *Trin.* 4 *Annæ Reginæ*, Indictment for being a Bawd, and procuring Men and Women to come together, to commit

mit Fornication, this is only having a good Opinion of the Thing, but no Libel.

Recorder quoted 1 *H.* 7. 7. *Palmer* and *Thorp*, 4 *Co.* 20, 22. 1 *Saund.* 133.

Holt: There are Eccleſiaſtical Courts, why may not this be puniſh'd there? If we have no Precedent, we cannot puniſh, ſhew me any Precedent. *Holt.*

Powell: This is for printing Bawdy ſtuff, but reflects on no Perſon, and a Libel muſt be againſt ſome particular Perſon or Perſons, or againſt the Government. It is ſtuff not fit to be mentioned publickly; if there ſhould be no Remedy in the Spiritual Court, it does not follow there muſt be a Remedy here. There is no Law to puniſh it, I wiſh there were, but we cannot make Law; it indeed tends to the Corruption of good Manners, but that is not ſufficient for us to puniſh. *Powell.*

Holt: Who is libel'd here? This may be ſaid to be a Temptation to Incontinence, and therefore why not puniſhable in the Eccleſiaſtical Court? This tends to Bawdry as well as ſoliciting of Chaſtity, but they do it only to get Money. *Holt.*

Powell: As to the Caſe of Sir *Charles Sidley*, 1 *Sid.* 168. there was ſomething more in that Caſe, than ſhewing his naked Body in the Balcony, for that Caſe was *quod Vi & Armis* he piſs'd down upon the Peoples Heads. Judgment *pro Def' niſi per tot' Cur'*. *Powell.*

Trin. 6 Anne, it came on again.

Holt: Theſe are Matters not fit for publick Examination, let there be Judgment *niſi* the End of the Term for the Defendant. *Holt.*

Powell:

Powell: Here they ſay is a Libel, and yet it is againſt no particular Perſon or Perſons. There was Lady *Purbeck*'s Caſe, which was in the Star-Chamber, they quaſhed the Indictment becauſe it was for Matters of Bawdry.

Note; By the Civil Law, any Perſon that was convicted of of publiſhing a Libel was eſteemed infamous ſo that he could not make a Will or be an Executor or Legatee. *Swinb.* 60, 233.

N. B. There was a Caſe of *The King* and *Curl* in *B. R.* which was an Indictment for printing and publiſhing a Libel called *The Nun in her Smock*; which contained ſeveral Bawdy Expreſſions, but did contain no Libel againſt any Perſon whatſoever; the Court gave Judgment againſt the Defendant, but contrary to my Opinion; and I quoted this Caſe. And indeed I thought it rather to be publiſhed on Purpoſe to expoſe the *Romiſh* Prieſts, the Father Confeſſors, and Popiſh Religion.

7 *September* 1722. 8 *Geo.* I.

At the OLD BAILY.

The King verſus *Biſhop of Rocheſter, Mr. Kelly and Mr. Cockran.*

THEY were committed to the *Tower* for High Treaſon, plainly expreſſed in the Warrant of Commitment, but not ſpecifying where the Treaſon was committed, and were brought to the *Old Bailey* on the 7th of *September* 1722. and that being the firſt Day of the Seſſions, they made their Prayer, thinking to be bailed or tried, according to the *Habeas Corpus* Act. Several eminent Counſel were fully heard to it, but the Court rejected the Motion, as being againſt conſtant Experience, and without one ſingle Precedent to maintain it.

Perſons who are committed to the *Tower* for High Treaſon, cannot make their Prayer at the *Old Baily*, to be tried or bailed.

The King no Doubt, can chuſe his Priſon to detain, as well as his Court to try; but they are committed to the *Tower*, which is no Part of the Gaol of *Newgate*, and our Commiſſion here, is to deliver the Gaol of *Newgate*; nay, ſuppoſe they did come from *Newgate*, if the Treaſon appeared to be in *Surry*, or *Scotland*, no Prayer could be allowed. The Regicides indeed were all committed to the *Tower*, but then they were ſent to *Newgate* to be tried. How can this Court bail a Priſoner, who is in another Priſon? The Priſoner cannot chuſe his own Gaol; and this Treaſon does not appear to be either in *London* or *Middleſex*. It ſeems, at the *Old Baily* there is a Commiſſion of *Oyer* and *Terminer* for *London* only, (but no Commiſſion of *Oyer* and *Terminer* ever for *Middleſex*) and a Commiſſion of Gaol Delivery, which is to deliver the Gaol of *Newgate*. The Motion was refuſed, becauſe the *Tower* is no Part of the Gaol of *Newgate*.

Their Commiſſion is to deliver the Gaol of *Newgate*.

No Commiſſion of *Oyer* and *Terminer* for *Middleſex*.

The King verſus *Yate*, 2 *W. & M. Show.* 190. He was committed to *Hull* Priſon, and Sir *B. Shower* moved (it being

Precedents for the Crown.

for High Treaſon) to enter his Prayer at the King's Bench; but was refuſed by Chief Juſtice *Holt* and the whole Court, becauſe it was to be at the next Gaol Delivery for *Hull*, where he was impriſoned; for the Act muſt be taken *reſpectivè* and not *disjunctivè*, otherwiſe all the Felons in the Country Gaols in *England* would be diſcharged; for if they were committed juſt after the Aſſizes were over, and come here to the *Old Baily*, they muſt be bailed if not indicted the firſt Term, and if not tried the next muſt be diſcharged; and yet cannot be indicted but in the County where the Felony or Treaſon is committed. This Point was reſolved in the Caſe of *King* and *Bernard*, and *The King* verſus *Mackintoſh*; ſo it was in Lord *Ruſſel*'s Caſe, who was committed to the *Tower*, and after that by *Habeas Corpus* ſent to *Newgate*. The ſame Point was reſolved in Lord *Shaftesbury*'s Caſe; and here the Court ſaid, they could deliver none but thoſe in the Gaol of *Newgate*; and long before that in 35 *Car.* 2. *King* verſus *Gibbons*; this was a Commitment to the *Gate-houſe*, and Prayer made; and by *Jeffries* Ch. J. *& tot' Cur'* declared, the *Gate-houſe* is not a Priſon within our Juriſdiction. It is the next Seſſions of *Oyer* and *Terminer*, or general Gaol Delivery, that is the Place where the Priſoner is to be tried. The Court told them they thought there was no Inſtance of ſuch a Prayer being allowed or entered, but it had been often denied, and all the Counſel agreed they could give no Inſtance, nor could any of the Clerks ever remember any ſuch Precedent.

3 St. Tr. 671, 699, 704.
4 St. Tr. 187.
2 St. Tr. 612.

In this Caſe Chief Juſtice *Pratt* was clearly of the ſame Opinion, as was Mr. Juſtice *Forteſcue A.* and ſo was the Lord Chancellor *Macclesfield*, when the Caſe was put to him; who thought that the *Habeas Corpus* Act was not to put Trials or Bail out of their ordinary Courſe, but to quicken the Proſecutor in the common and ordinary Way; and therefore could not make that triable at the Seſſions of the *Old Baily*, which was uſually tried in the King's Bench. If Treaſon be committed in the Country, it cannot be tried till next Aſſizes after, and yet the King may grant a Commiſſion of Oyer and Terminer, to try it before if he pleaſes; as here, he might by *Habeas Corpus* ſend the Biſhop of *Rocheſter* to

Lord Chancellor *Macclesfield*'s Opinion on the *Habeas Corpus* Act.

Treaſon when and where triable.

Newgate Priſon to be tried; and before the Act it was uſual to try in the King's Bench ſuch as were committed to the *Tower*: For which Reaſon he thought that if there had been a Commiſſion of Oyer and Terminer for *Middleſex*, at the *Old Baily* (as there really never is) yet a Prayer ought not to be entered at the *Old Baily*, becauſe it is putting it out of the common Way of Trial; and ſo if they had made their Prayer at *Hicks's Hall* the firſt Day of the Term, that it ought not to be granted; but it is very clear, that at the *Old Baily* where no Commiſſion of Oyer and Terminer for *Middleſex* ever is, it ought not to be granted.

The Judges willing to receive all the Satisfaction they could, aſked the Clerks Mr. *Tanner* and Mr. *Harcourt*. Mr. *Tanner* had been a Clerk of the Arraigns ever ſince the Revolution, and his Father had been in that Place ever ſince the Reſtoration; and he produced his Book of Notes, and quoted the Caſe of Sir *John Muſgrove*, who was committed for High Treaſon, for adhering to the King's Enemies beyond Sea, and was committed to the *Gate-houſe*; and he moved to enter his Prayer at the *Old Baily*; and by C.J. *Holt* and the whole Court it was refuſed, and they ſaid they had no Juriſdiction, nor was there any other Note or Memorandum about ſuch a Prayer in the whole Book; and Mr. *Harcourt* Clerk of the Indictments was of the ſame Opinion, that no ſuch Prayer was ever granted: That Caſe was in 1694.

The ſame Queſtion was moved for Lord *North and Grey*, and Lord *Orrery* at *Hicks's Hall* the firſt Day of *Michaelmas* Seſſions; but by the whole Court refuſed. Reſolution for the Crown.

The *Tower* is generally eſteemed to be for State Priſoners, where Lords and great Men are committed for their greater Eaſe, tho' the Fact was committed in another County; elſe they muſt go into naſty Country Gaols, where there are no proper Accommodations. All the Books at *Hicks's Hall* had been ſearched, and they could find no ſuch Motion ever granted ſince the *Habeas Corpus* Act: Which muſt have been, if the *Tower* was thought to be within the Juriſdiction of the *Old Baily*.

DE
Term. Paſch.

6 *Annæ Reginæ.*

In the KING'S BENCH.

Kendall and *John.*

An Action for a falſe Return of a Member of Parliament. 2 Salk. 505.

The Declaration.

JAMES Kendall, Eſq; complains of *John John* in Cuſtody of the Marſhal, *&c.* becauſe that whereas 2d of *May* in the Year of the Reign of our Lady the Queen that now is the fourth, a certain Writ of the ſaid Lady the Queen that now is out of her Chancery (the ſame Chancery then being in *Weſtminſter* in the County of *Middleſex*) under her great Seal of *England* did iſſue to the then Sheriff of *Cornwall* directed, by which ſame Writ reciting, becauſe that the ſame Lady the Queen, by the Advice and Aſſent of her Counſel, for certain difficult and urgent Affairs the ſame Lady the Queen, the State and Defence of her Kingdom of *England*, and Church of *England* concerning, a certain Parliament of hers at her City of *Weſtminſter*, 14 *June* then next to come to be held gave Orders and there with the Prelates, Noblemen and Peers of her ſaid Kingdom to diſcourſe with and treat; the ſame Lady the Queen, the ſaid then Sheriff of *Cornwall* commanded, firmly injoining him that making Proclamation in the next County of the ſaid Sheriff *poſt receptionem br'is ill.* to be held, of the Day and Place aforeſaid, two Knights girt with Swords of the more fit and diſcreet of the ſaid County, and of every City of that County two Citizens, and of every Borough two Burgeſſes of the more diſcreet and ſufficient, freely and indifferently by thoſe who

ſhould be preſent at ſuch Proclamation according to the Form of the Statute for that Purpoſe made and provided, to be choſen; and the Names of the ſame Knights, Citizens and Burgeſſes ſo to be choſen, in certain Indentures between the ſaid Sheriff and thoſe preſent at ſuch Election thereof to be made, tho' ſuch Perſons ſo to be choſen were preſent or abſent, to be inſerted, and the ſame Perſons at the ſaid Day and Place to come ſhould cauſe, ſo that the ſame Knights full and ſufficient Power for themſelves *& Communitat' Comitat' Civitat' & Burgor' præd' diviſim ab ipſis haberent* to do and agree to thoſe Things which then there by the common Council of the ſaid Kingdom of the ſame Lady the Queen (by God's Favour) ſhould happen to be ordained upon the Buſineſſes aforeſaid; ſo that for Want of ſuch Power or by reaſon of an improvident Election of Knights, Citizens or Burgeſſes aforeſaid, the ſaid Buſineſſes undone ſhould not remain in any Manner. And our Lady the Queen would not that the ſaid Sheriff nor any other Sheriff of the ſaid Kingdom of the ſaid Lady the Queen any way ſhould be elected. And ſuch Election in his full County made, diſtinctly and openly, under the Seal of the ſame Sheriff, and the Seals of thoſe who were preſent at ſuch Election, to the ſaid Lady the Queen in her Chancery, at the ſaid Day and Place ſhould certify without Delay; remitting to the ſaid Lady the Queen the other Part of the ſaid Indenture to the ſaid Writ, tacked together with the ſaid Writ. As in the ſame Writ more fully is contained. Which ſame Writ afterwards and before the ſaid 14th Day of *June* in the fourth Year aforeſaid, *viz.* 15th Day of *May* in the Year of the Reign of our ſaid Lady the Queen that now is, the fourth aforeſaid, at the Borough of *Leſtwithiel* in the ſaid County of *Cornwall*, to one *John Williams*, Eſq; then and there Sheriff of the ſame County being, in Form of Law to be executed, was delivered; by virtue of which ſame Writ afterwards, *viz.* the ſame Day and Year at the Borough of *Leſtwithiel* aforeſaid, the ſame *John Williams* then Sheriff of the ſame County being, his certain Precept in Writing under the Seal of his ſaid Office made, And *to the Mayor and Burgeſſes of the Borough of* Leſtwithiel *in the County aforeſaid directed*; by which ſame Precept the ſame Sheriff by Virtue of the ſaid

The Writ delivered to the Sheriff;

his Precept for electing Burgeſſes of *Leſtwithiel*;

Writ of the Lady the Queen for the ſummoning of a Parliament to be held at the City of *Weſtminſter* the 14th Day of *June* then next enſuing to him directed, *the ſaid Mayor and Burgeſſes commanded*, that out of the Borough of *Leſtwithiel* aforeſaid, they ſhould cauſe to be elected two Burgeſſes of the more diſcreet and more ſufficient to be at the Parliament of our ſaid Lady the Queen at the Day and Place aforeſaid, to do and conſent to thoſe Things as the ſaid Writ in itſelf did require, publick Proclamation of the Day and Time of ſuch Election in different Places within the Borough aforeſaid being before made, according to the Tenor of a certain Proclamation of the ſaid Lady the Queen, in this Caſe then lately iſſued out and provided; and by reaſon of the Shortneſs of Time, *the Names of thoſe Burgeſſes to the ſame Sheriff ſhould certify without Delay, with that Precept of his.* Which ſame Precept after and before the ſaid 14th Day of *June* in the fourth Year aforeſaid, *viz.* 17th Day of *May* in the fourth Year aforeſaid, at *Leſtwithiel* aforeſaid in the County of *Cornwall* aforeſaid, *to the ſaid* John John *then Mayor of the Borough of* Leſtwithiel *aforeſaid being, was delivered in Form of Law to be executed*; which ſame *John John* Mayor of that Borough as beforeſaid being, afterwards, *viz.* the ſame Day and Year laſt mentioned, at *Leſtwithiel* aforeſaid, by publick Proclamation in that Behalf duly made, publick Notice to the Burgeſſes of that Borough gave, that the Election of two Burgeſſes of the ſame Borough at the ſaid Parliament of the ſaid Lady the Queen to be, ſhould be had the 21ſt Day of the ſame Month of *May* at *Leſtwithiel* aforeſaid in the Borough aforeſaid. And the ſame *James Kendal* further in Fact ſays, that he the ſaid *James Kendal*, afterwards, *viz.* the ſame 21ſt Day of *May* in the Year of the Reign of our Lady the Queen that now is the fourth aforeſaid, at *Leſtwithiel* aforeſaid in the County aforeſaid, the ſame *James Kendal* then being beyond the Age of twenty-one Years, and not being Sheriff of any County, by the Burgeſſes of the ſame Borough of *L.* then the Right of electing in that Behalf having, and then and there being preſent, publickly, indifferently, notoriouſly, duly and according to the true Intention, Tenor and Effect of the Writ and Precept aforeſaid, was elected and nominated

delivered to the Mayor;

he makes Proclamation;

the Plaintiff is elected a Burgeſs;

nated one of the two Burgeſſes of the ſame Borough, to be at the ſaid Parliament of the ſaid Lady the Queen, at the Day and Place aforeſaid, according to the Command of the ſaid Writ and Precept. Yet the ſaid *John John* Mayor of the Borough aforeſaid, as is ſaid, then being, the ſaid Premiſſes ſufficiently knowing, *little regarding the Duty of his Office in this Behalf*, and contriving and maliciouſly intending the ſame *James Kendal* in this Behalf unjuſtly to oppreſs, and him from his Place in the ſaid Parliament of the ſame Lady the Queen that now is, to exclude and hinder, the Name of the ſame *James Kendal as one of the two Burgeſſes of the ſaid Borough elected to be at the ſaid Parliament, to the ſame Sheriff of the County of* Cornwall *did not certify*, but him to be ſo elected to certify, voluntarily, obſtinately and altogether there refuſed. And the ſame *John John* Mayor of the Borough aforeſaid, as is reported, being, then and there after the Election aforeſaid ſo made as aforeſaid, obſtinately, falſely and malitiouſly, *againſt the Duty of his ſaid Office, viz.* the ſaid 21ſt Day of *May* in the fourth Year aforeſaid, at *Leſtwithiel* aforeſaid, a certain Indenture between the ſaid *J. Williams*, by the Name of *John Williams*, Eſq; Sheriff of the County of *Cornwall* aforeſaid, of the one Part, and the ſaid *John John*, by the Name of *John John*, Gent. Mayor of the Borough of *Leſtwithiel* aforeſaid, *capital Burgeſſes and Aſſiſtants* of the ſame Borough, of the other Part, *to be made cauſed.* And ſuch Indenture then and there to the ſame Sheriff *to be returned procured*; by which ſame Indenture it was falſely and maliciouſly returned, that the ſaid Mayor, capital Burgeſſes and Aſſiſtants, by their unanimous Conſent, as alſo Aſſent, did elect, nominate, conſtitute and appoint the honourable *Ruſſel Roberts* and *Robert Moleſworth*, Eſquires, two Burgeſſes of their Borough aforeſaid, to be at the Parliament then to be held at *Weſtminſter*, the 14th Day of *June* then next enſuing after the Date of theſe Preſents, to do and conſent to all thoſe Things, which by the Common Council of this Kingdom of *England* then and there (God favouring) ſhould happen to be ordained; by which the ſaid *John Williams* Sheriff of the ſaid County of *Cornwall*, as is beforeſaid, being, afterwards, *viz.* the 14th of *June* in the fourth Year aforeſaid, in the Chancery

the Mayor does not certify him to the Sheriff;

but returned others as Burgeſſes;

whom the Sheriff returned into the Chancery;

Chancery of the ſaid Lady the Queen, at *Weſtminſter* aforeſaid in the County of *Middleſex* aforeſaid then being, did return and certify the ſaid Indenture to the ſaid Writ annexed, where truly and in fact the ſaid *Robert Moleſworth* was not elected one of the two Burgeſſes of the Borough of *L.* aforeſaid, to be at the ſaid Parliament. And where in Truth and *in Fact the ſaid* James Kendal *was elected* one of the two Burgeſſes of the Borough of *L.* aforeſaid, to be at the ſaid Parliament; whereby he the ſame *James Kendal* a great Sum of Money, *viz.* 500 *l.* to have and obtain his Place aforeſaid in the Parliament aforeſaid, to lay out and expend was forced, *viz.* at *L.* aforeſaid in the County of *Cornwall* aforeſaid, and his ſaid Place in Parliament for a long Time loſt, *viz.* to the 17th Day of *January* in the fourth Year aforeſaid. On which Day the Houſe of Commons of the ſaid Parliament, at *Weſtminſter* in the County of *Middleſex* then being, did adjudge and determine the ſaid *Robert Moleſworth* not to be duly elected a Burgeſs to ſerve in the ſaid Parliament for the ſaid Borough of *Leſtwithiel*, and him the ſaid *James Kendal* to be duly elected a Burgeſs to ſerve in the Parliament aforeſaid for the ſaid Borough of *Leſtwithiel*; whereupon the ſame *James Kendal* ſays, that he is prejudiced and has Damage to the Value of 500 *l.* and thereon follows his Suit, *&c.*

tho' one of them was not duly elected,

but the Plaintiff was.

The Plaintiff at great Expences;

and Loſs of Time.

Houſe of Commons determines in his Favour.

After Iſſue joined, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment upon two Points: *Firſt*, That the Action did not lie at Common Law: *Secondly*, That it did not lie on any Act of Parliament whatever. Mr. *Forteſcue A.* firſt argued to arreſt the Judgment, becauſe this Action did not lie at Common Law, in Manner following:

Motion in Arreſt of Judgment.

1ſt Point, Action lay not at Common Law;

2d Point, nor on any Act of Parliament.

This is a new Action that never prevailed before, and I hope ſhall not now. 'Tis the Opinion of *Littleton* and my Lord *Coke* too, that this is a very good Argument to inſiſt on, that if this Action would have lain, it muſt be ſuppoſed that ſome time or other it would have been brought; and Uſage, as the ſame Author ſays, is the beſt Interpreter of Laws; and as this was ſpoke by my Lord *Coke* of Offences

Mr. *Forteſcue A.*'s Argument for the Defendant.

The Action lies not at Common Law, becauſe without Precedent.

in Parliament; ſo with equal Juſtice it may be ſaid of Offences relating to Parliament. 4 *Inſt.* 17. 1 *Inſt.* 108. *Litt. Sect.*

But 'tis ſaid, this Action is found in the *Genus* tho' not in the *Species*; and indeed that is the only Anſwer can be given to it: But, with Submiſſion, it does not lie in the *Genus*, if we take the true and immediate *Genus*; for the true *Genus* is not that Caſe lies at Common Law for a Damage coupled with an Injury, no more than if I ſhould take a larger *Genus*, and ſay, that Caſe lies at Common Law; no Doubt that is true, but that would not prove that this Action lay, becauſe it is not the immediate *Genus*, but too remote and large a one; but the true *Genus* is, that Caſe lies for a Damage coupled with an Injury done in Matters relating to Privileges of Parliament, if they can ſhew that, then this Action as a proper *Species* will lie. Action of Caſe will lie for ſcandalous Words, but it by no Means follows, that Caſe lies for the ſame ſcandalous Words ſpoke in the Houſe of Commons. So that this Way of Reaſoning makes an End of their Objection from all the new Caſes that have been adjudged lately. But ſuppoſing they ſhould bring it under this Head, that Actions for falſe Returns lie at Common Law; therefore this does. This does not follow, becauſe the Reaſon is different.

Anſwer to the Objection from new Actions on the Caſe.

For, the Reaſon why theſe Actions lie in all other Caſes of falſe Returns, is, becauſe there is no averring againſt a Record; ſo the Return cannot be traverſed, and the Party is abſolutely concluded, and has no other Remedy but an Action; and if he has loſt an Office can never be reſtored but by his Action: But here there is a Remedy in Parliament, and he may be reſtored to his Seat in Parliament by the Houſe of Commons, which is the principal Thing conſidered. And ſo is *Bag*'s Caſe, 11 *Co.* If a Layman be Patron of an Hoſpital, he may deprive the Maſter; but if he do it without Cauſe, he may have an Aſſiſe, becauſe there is no other Remedy: But if the Ordinary deprive a Maſter that is eccleſiaſtical without Cauſe, he ſhall not have an Aſſiſe, becauſe he has a Remedy in the Spiritual Court

The Reaſon why Actions lie for falſe Returns,

holds not in this Caſe.

by Appeal; ſo that this Action is given in thoſe Caſes only out of Neceſſity, in the Nature of it, becauſe otherwiſe the Party would be without Remedy; which the Law forbids.

No Damage to the Party.

Secondly, Here is no Damage to the Party. This Office of a Member of Parliament is no Freehold, nor is it an Office of Profit, 'tis at moſt but an Office of Truſt, and that not for any fixed Time; it conſiſts only of having a Power to treat and to agree with the Queen and Lords about Matters of State, and that only during the Queen's Pleaſure.

In the Caſe of the Bridge-Maſter in 2 *Lev.* 50. which was Caſe for denying him the Poll, by which he loſt the Profits of that Office, it was adjudged to lie principally, becauſe it was an Office of Profit. *D'Anvers Abr.*

So if *Ceſtui que Uſe* at Common Law had requeſted his Feoffees to make a Feoffment to *J. S.* and they refuſed, to his Damage, yet no Action lay, although here is an Injury as well as a Damage. *Roll. Rep.* 12 *Ja. D'Anv.* 205.

In the next Place it is a Service, and heretofore thought a hard one too. If they had not thought it ſo, Gentlemen would never ſo tamely have ſuffered ſo many Towns to have petitioned to be excuſed from ſending Members. The relative Word *Wages*, ſhews the Antecedent to be *Service*; 'tis called ſo in many Acts of Parliament, and even in this very Declaration, *electus ad deſerviend' in Parliamento.* And it appears yet plainer from the Etymology of Knights of the Shire, which ſignifies no more than Gentlemen that ſerve for the Shire. For Cnihc, *Cniht*, is an ancient *Saxon* Word that ſignifies *Servant*; witneſs that Uſe of it, ſays *Somner* in his *Dictionarium Saxonico-Latino-Anglicum*, yet remaining in our Knights of the Shire, who, tho' no Knights by Dignity are ſo called; but why? ſays he, under Favour, in regard of that Service which is required and performed by them in Parliament for their ſeveral Counties, *whoſe Servants for the Time they are.* But ſays he, we have now loſt this old Signification, and generally underſtand by it *Miles*; but in that

Knights of the Shire.

Notion, ſays he, I never find it uſed by the *Engliſh Saxons*; for there were Knights of the Shire long before there were *Milites* among the *Normans* who ſucceeded the *Thanes* of the *Saxons*.

Now, 'tis true generally if there be an Injury, tho' no Damage, an Action at Common Law will lie; but then 'tis to be taken with this Reſtriction, that it be a Common Law Injury; for the Remedy is always of the ſame Nature with the Injury; and therefore if a Man have an Injury in Equity, as by a Legacy's being detained from him, he has an Injury 'tis true, but 'tis in Equity, and therefore no Remedy at Law, and ſo of a Breach of Truſt; ſo that this brings me to another Head, and that is,

Thirdly, That this Right which the Plaintiff pretends to have, is a parliamentary Right. It was originally created not by Letters Patent, or by Preſcription, but by the Cuſtoms and Uſage of Parliament, by the ancient Conſtitutions of the Witena-gemote, *Witena-gemote*, of the *Saxons*, and for ought any Body knows, is as ancient as the Kingdom itſelf. The Right is Parliamentary;

Now if this be a Parliamentary Right, it neceſſarily follows, the Remedy is Parliamentary, and to be had no where elſe. For it is moſt true, and muſt ever remain ſo, that where there is a Right by Common Law, there muſt be a Common Law Remedy; for 'tis involved in the very Definition of a Common Law Right, that he ſhould have a Remedy; which makes it a Demonſtration, and ſuch a one as the Schools call *Demonſtratio potiſſima*, which is from the very Cauſe and Eſſence of the Thing. And therefore this Propoſition will reciprocate; he that has a Common Law Right has a Common Law Remedy, and he that has a Common Law Remedy has a Common Law Right. So here, if it be a Parliamentary Right, then the Parliament can give a Remedy, and again it holds in the Negative; if this be no Common Law Right, there can be no Common Law Remedy. therefore the Remedy muſt be Parliamentary. If this not a Common Law Right, there can be no Common Law Remedy.

Beſides,

This is no Damage to the Plaintiff.

Beſides, this is no Damage to the Plaintiff, but to the Borough; for he ſits in Parliament only *Jure Repræſentationis*, and therefore as in the Caſe of Churchwardens, he ſhould rather have declared *ad damna Burgenſium*, as they do *ad damna Parochianorum*. And by the ſame Reaſon that this particular Man may bring his Action, every one of the Electors may do ſo too; for by one ſingle Act here every one is injured, and that brings it exactly within the Reaſon of *Williams*'s Caſe in 5 *Co.* Nay I think I may go a Step farther and ſay, it is an Injury to the whole Kingdom; and why then may not every Man have an Action? which the Common Law will not indure.

Remedy given by Stat. 23 *H.* 6.

Fourthly, There is a reaſonable and ſufficient Remedy given to the Party injured, by the Statute of the 23 *H.* 6. There is 40 *l.* given to the Party grieved, and Coſts; and 40 *l.* to the King, in the Caſe of a Mayor; and 100 *l.* to the Party, and as much to the King in the Caſe of a Sheriff, and Impriſonment for Life. Theſe Remedies and Penalties ſurely are not ſo very light and mean as theſe Gentlemen would have them, as that they ſhould indeavour to ſtrain a Point of Law to make them greater.

But ſay they, this Statute has no negative Words, and therefore the Remedy at Law (if any ſuch there were) is not taken away: I agree that; but what I ſay is, that it appears manifeſtly and clearly, upon comparing the ſeveral Parts of this Act together, that no Action lay at Common Law, or was thought of by the Makers of this Act of Parliament.

The Act ſuppoſes that no Action lay at Common Law.

This Act recites former Statutes concerning falſe Returns, and complains grievouſly of the Miſdemeanors of the Sheriff, and then ſays, *becauſe ſufficient Penalty and convenient Remedy for the Party grieved, is not ordained in the ſaid Statute againſt the Sheriff, Mayors and Bailiffs.* Therefore it enacts this Remedy of 100 *l.* and 40 *l.* Now, from theſe Words 'tis plain, that the Cauſe of giving this Remedy was be-

cauſe there was no Remedy before, either by Statute or at Common Law; for if there had been a Remedy at Law, there could be no Reaſon for the giving this Remedy. It cannot reaſonably receive any other Conſtruction: For it would be the wildeſt Thing in the Word to imagine a Parliament would make a Law on Purpoſe to give 40 *l.* when the Common Law might give him 500 *l.* nay indefinitely what a Jury pleaſes. And is this to be called a Remedy?

Beſides, let us conſider the Subject Matter of this Act, which is totally concerning Matters of Elections of Members of Parliament; and therefore the Makers of the Law could not dream of Actions at Common Law, none having ever been heard of: Therefore by a Neceſſity of Interpretation, the Words *no Remedy being given by any of the ſaid Statutes*, muſt amount to ſay that there was no Remedy at all.

Our Forefathers have always been content with this Remedy, and Actions have been conſtantly brought upon the Act, and not one Action at Common Law brought ſince *William the Conqueror*'s Time 'till *Nevil*'s Caſe in 1659. *Old Co. Ent.* 149. *Hob.* 78. againſt the Mayor of *Stockbridge*; and *Buckley* and *Thomas* in *Plowden.* Plowd. 120. Dyer 113. pl. 57.

The Judges and Counſel in that Caſe, it ſeems, knew nothing at all of this new Invention. If they did, it is much it was not even hinted at in the long Debates of that Caſe; and they would no Doubt have prevented that Queſtion, whether the Sheriffs of *Wales* were bound by the Statute of 23 *H.* 6. if an Action lay at Common Law.

In the next Place, there are Inconveniences in the Remedy by the Common Law, which are not in that by the Statute, and there are Conveniencies in the Remedy by the Statute to the Party grieved, not in the Remedy given by the Common Law. The Sum to be recovered is limited, the Informer has a Time prefixed; but the Remedy by the Common Law is without Limitation of Time or Meaſure of Damage. And to have an Action of unlimited Damages hang like Clouds and Storms over his Head Argument from Inconvenience.

during his whole Life, is not of a Piece with the gentle and mild Rules of the Laws of *England.* By the Remedy at Common Law, if a Sheriff or Officer dies, the Party can have no Remedy at all; but by the Statute, an Action of Debt is given againſt his Executors and Adminiſtrators.

The Privileges of the Houſe of Commons are concerned.

Fifthly, This is a Matter that concerns the Privileges of the Houſe of Commons, and ought to be determined there and in no other Place.

Firſt, This Officer, as he was imployed and concerned in this Return, is an Officer of the Houſe of Commons.

Port-Reeve, what?

A Mayor now is inveſted with many more Privileges, and makes a much greater Figure than heretofore, but he is ſtill no more in the Nature of his Office, than what was anciently called a *Port-Reeve*, or as the *Saxons* called him Port-gerefe, *Port-gerefe*; and therefore in ancient Records we find the Head Officer of the City of *London* called *Port-Reeve.* Now 'tis plain to every body, that the Return of Precepts is quite alien from the Buſineſs of a Port-Reeve, which in Effect is no more than a Bailiff or Reeve of a Manor, and therefore they never had nor could have the Return of Precepts by Virtue of their Office, but it was annexed to their Office by Act of Parliament. For 'tis by the Statute 23 *H.* 6. that firſt enacts that the Sheriff ſhould direct his Precept to the Mayor; for, before that Act, the Sheriff uſed to chuſe Burgeſſes in Boroughs, without ſending any Precept to the Mayor; becauſe he is commanded by the Writ of Summons, not only to chuſe Knights, but Citizens and Burgeſſes too; and then the Act does afterwards direct, that the Mayor ſhall make his Return to the Sheriff. Whereby it appears plainly, that *quoad* this Return he is an Officer and Creature of the Houſe of Commons, and therefore ought to have their Protection, and to them only is accountable. 'Tis a Diſhonour to the Houſe of Commons to have their Servants called in Queſtion by any other Authority; and it is a Terror to ſuch Servants, which will make them leſs willing to ſerve their Maſters, and more remiſs in their Duty. Therefore no Action will lie, no more

The Return of Precepts given him by Act of Parliament.

He is an Officer of the Houſe of Commons, as to Returns, &c.

therefore puniſhable only there.

more than againſt the Serjeant at Arms, the Clerk, or Speaker of the Houſe of Commons.

There is a further Argument ſhews, he is in this an Officer of the Houſe of Commons; becauſe by an uninterrupted Uſage of Parliament, the Houſe of Commons have, on Complaint, ever ſent for ſuch Officers. They have a Power to fine them for Offences, and to commit them to Priſon; and no other Court will interpoſe in the Exerciſe of it.

The Commons have always exerciſed this Juriſdiction.

Was it ever known, that for a falſe Return or Miſdemeanor in the Officer, the Chancery did puniſh ſuch Officer? no ſurely. Though in all other Caſes where Writs are directed to Officers, and they miſbehave themſelves in the Return, though no immediate Officers to thoſe Courts where ſuch Writs are returnable, yet they daily and moſt juſtly puniſh them; becauſe *quoad* that Return they become Officers of that Court. Nor can the Chancellor haſten ſuch Return if the Sheriff be ſlack, nor can he alter the Return if faulty. Beſides, there is a Difference between this Officer and a Sheriff, for he is a ſworn Officer at Common Law, and this is not.

Secondly, The Matter of the Return is concerning the Right of Elections, which indiſputably ought to be under the ſole Determination of the Houſe of Commons. Nay, the Right of Election is here the very Iſſue to be tried, and the *Cauſa ſine quâ non* of the Giſt of the Action. For unleſs the Plaintiff was elected, he cannot be intitled to any Action tho' the Return be never ſo falſe. Therefore to avoid any Diſhonour to the Houſe of Commons by the claſhing of Juriſdictions, ſuch Action ought not to lie. And to ſay the Return is only into Chancery, is only a Piece of Sophiſtry; for 'tis plain the Offence is principally and in its Nature, an Offence againſt the Houſe of Commons, and not to the Chancery; for the Chancery cannot amend theſe Returns, but the Houſe of Commons does, and always did; and they think the Chancery is only a Repoſitory for their Writs, and that the Return ultimately centres with them; nor

The Matter is within their Juriſdiction.

The Chancery cannot amend theſe Returns.

nor can any Writ of Summons iſſue out of Chancery on the Death of a Member, without their Warrant.

The Commons only can give an adequate Remedy.

Sixthly, They have an adequate Remedy in the Houſe of Commons. The Houſe of Commons alone can determine this Right, and reſtore the Party to his Seat in Parliament; they can ſend for the Clerk of the Crown, and make him alter the Return, and raſe out one Man's Name and put in another; and all this was done in this Caſe, and the Plaintiff is in Poſſeſſion. And farther, the Houſe has Power to commit any Officer to the Cuſtody of the Serjeant at Arms, if he be guilty of any Miſbehaviour in the Return; and in all Probability they would have done ſo in this Caſe, had he deſerved it. It is improper to call the Money the Plaintiff has expended about the Conteſt of this Election, Damages; they are not ſo, they are more properly Coſts of Suit. They are Coſts of Suit in a Houſe of Parliament, ariſing, begun and ended there; and one would think, that the Court where the Suit is, ſhould be thought the moſt proper to tax the Coſts there expended. Nay, this has been done, and I have been informed, is the Practice of the Houſe of Commons, in exorbitant Caſes that require it. There is one Caſe in Print, 9 *W.* 3. and that is the Caſe of one *Tankred*, who exhibited a frivolous Petition in Parliament againſt another; and the Defendant was ſent for and appeared, and upon Examination it was found, that the Defendant was innocent of the Accuſation, and he was diſcharged; but they made an Order that the Petitioner ſhould pay Coſts out of Pocket. And to ſay, they have no Way to inforce the Execution of theſe Orders; ſurely there is nothing in that; for they have the ſame Way the Court of Chancery has had Time out of Mind, which is by committing the Perſon until Payment; and I believe in the Opinion of every *Engliſhmen*, this would be thought a more diſagreeable Way of Execution, than to have it laid on his Lands or Goods.

The Commons ſometimes give Coſts;

and commit until Payment.

No Coſts at Common Law in any Caſe.

But ſuppoſe the Houſe of Commons cannot give Coſts; yet it does not follow, that an Action muſt lie for Coſts. For no Coſts were given at Common Law in any Caſe whatſoever; no Coſts are now given in real Actions, nor in a

Quare Impedit; and till of late no Coſts were given in a *Scire Facias* and Prohibition; and yet it was never attempted to form an Action on the Caſe for thoſe Coſts, by calling of them by the Name of Damages. And yet in every one of theſe Caſes here is an Injury and Expence of Money.

Nor will an Action lie for Coſts by the Name of Damages.

As to Caſes, 'tis not to be expected many can be quoted, becauſe but few Attempts of this Nature have been made, and thoſe that have, have met with very ill Succeſs.

The firſt was *Nevil*'s Caſe, 2 *Sid.* 168. which was in 1659; that was adjourned into Parliament *propter Difficultatem*, and by them adjourned into the Exchequer Chamber, and there it died.

Caſes anſwered.

Another Caſe, which is in *Lutwyche* 88. *Prideaux* and *Morris*, that is our very Caſe, only that is before any Determination in Parliament for the Plaintiff. Now if I can make it out, that there is no Difference whether brought before or after a Determination in the Houſe of Commons, it will then be a Caſe in Point.

Salk. 502. Fareſley 13.

I find the only Reaſon the Court of Common Pleas gave, why probably there might be ſome Difference between theſe two Caſes, was, that if Actions be brought before a Determination, there might be a claſhing of Juriſdictions. Now, that Reaſon holds as ſtrong in this Caſe as in that, for it is in the Breaſt of a Jury to find the Iſſue againſt ſuch Determination; for a Jury is not, nor can be bound by any Opinion of the Houſe of Commons, nor by any Court or Law in the World, but that of their own Conſciences. The very Point in Iſſue here to be tried, is, whether the Plaintiff is elected or not; and would it not be the moſt abſurd Thing in the World to ſend down this Iſſue into the Country to be tried, when the Jury is already bound to ſay he was elected, tho' propounded to them as a hard Queſtion? No, they are bound by their Oaths to determine, not as the Houſe of Commons ſays, that is not their Oath, but according to their Evidence, *ſecundum allegata & probata*; and it lies intirely in their Breaſt, whether they can believe

A Danger of claſhing of Juriſdictions.

The Jury not bound by a Determination of the Houſe of Commons;

a Reaſon why not.

or diſbelieve all or any Part of the Evidence, let it come from whence it will. And if this be ſo, they may find againſt the Vote of the Houſe of Commons as well as with it, and thence will follow two contradictory Judgments in the ſame Cauſe, and yet both muſt ſtand.

Either this Court has an original Juriſdiction in Actions at Common Law for falſe Returns of Members to Parliament, or it has not. If it has a Juriſdiction, how can a Determination of the Houſe of Commons take it away? Can a Vote of the Houſe of Commons alter the Law? If it cannot, if this Court had no Juriſdiction at Common Law, I am ſure a Vote of the Houſe of Commons can never give this Court a Juriſdiction.

The Officer not bound, becauſe not heard.

But, ſuppoſe the Jury's Mouths were ſtopp'd in this Caſe; how can the Mayor be bound by this Determination of the Houſe of Commons, which was between other Parties? It is againſt the Law of the Kingdom and againſt common Juſtice, that any Man ſhould be condemned unheard: He was not a Party to the Suit in the Houſe of Commons, and had no Opportunity of clearing himſelf. If the Parliament had believed, that when they determined this Matter, they had ſaddled this Defendant with 150 *l.* Coſts, I doubt not at all but they would have heard his Defence.

Another Reaſon why the Jury is not bound by the Determination of the Commons.

There is another Reaſon why the Jury are not bound by this Determination; becauſe the Houſe of Commons and the Jury judge and determine by different Evidence and different Laws. The Jury have one Sort of Evidence and Law to judge by, and the Houſe of Commons another. The Jury judge in Matters of Evidence only by the Rules of the Common and Statute Law, wherein they are directed by the learned Judges, who are ſworn to determine according to the Laws of the Land; but the Houſe of Commons, in theſe Matters, is not tied up to the ſtrict Rules of the Common Law, but may admit of what Evidence they pleaſe, and they may judge according to natural Equity and Juſtice, according to the Cuſtoms and Uſages of Parliament in Matters of Elections, and other deep Reaſons of

State and Government. So that it may very well happen, that the Houſe of Commons may determine very uprightly that a Man was elected, and yet a Jury may determine as uprightly, that the ſame Man was not elected, becauſe they judge by different Rules. Beſides, this Argument is yet ſtronger, if it be conſidered, that the Witneſſes on this Trial were on their Oaths, but thoſe in the Houſe of Commons not; and 'tis every Day's Experience, that many a Man eſteemed reputable enough in the Eye of the World, will ſay that on his Word, which he would refuſe to ſay on his Oath.

The Commons have not cenſured the Officer.

But 'tis yet ſtronger after a Determination than before, becauſe the Behaviour of the Officer is always examined into, and if he is found faulty, he is always cenſured and committed. Now this Officer not being cenſured by the Parliament, but diſcharged, 'tis a very good Argument he was not guilty of any Miſbehaviour. Should this Court, on Complaint, examine the Miſbehaviour of an Officer, and not puniſh him; would not all the World conclude he was not guilty? Surely they would, and with all the Juſtice in the World. So here, ſince the Houſe of Commons who had his Accuſation under their Conſideration, did diſcharge him, 'tis a very great Argument, and a concluſive one too, he was not guilty of Malice and Falſity. But what is the Determination? The Houſe has determined that the Plaintiff was elected; but what then? it does not follow from thence that the Defendant is guilty. The Plaintiff may be elected, and yet the Defendant innocent.

The Plaintiff may be elected, and yet the Defendant innocent.

This Determination is no more than what we agree; but the Houſe of Commons did not determine we were to blame, nor that we were guilty of a malicious and falſe Return; which with Submiſſion ſhould have been done, if they would have grounded their Action upon this Determination; and ſo they ſhould have laid it.

But ſuppoſing there ſhould be a Difference between bringing an Action before and after a Determination, yet *Soams* and *Barnardiſton*'s Caſe, is with us in Point; and *Onſlow*'s Caſe followed that.

2 Sid. 168. 2 Vent. 37. 3 Lev. 29.

That

A double Return is in its Nature a falſe Return;

That Caſe is ſaid to be an Action of the Caſe for a double Return, after a Determination in Parliament; but if it be ſtripped of that Name, it will appear to be in its Nature and Effect a falſe Return, and is ſo alledged in the Declaration; for that is, that the Plaintiff being elected, the Defendant maliciouſly returned *quandam al' Indentur'*, beſides that by which he was elected, wherein it was contained, another was choſen. Now, the returning his own Indenture was juſt, but the Falſity and Malice was in returning the ſecond Indenture; which was the only Thing made the Election litigious. He has returned Contradictories, (for both could not poſſibly be choſen by a Majority); now, of Contradictories, one muſt neceſſarily be falſe, and the other true. The true one is his own Choice, which was to his Advantage; then it remains, that the other contradictory Indenture is falſe, and for that very Falſity the Action is brought; and therefore 'tis rightly laid in the Declaration, *ratione cujus quidem falſi return' Indentur' ult' mentionat'* he was damnified. So that this Caſe and *Onſlow*'s ſeem to be in Point with us in all reſpects; for a double Return is a falſe Return, and is ſo declared by the Statute of 7 *W.* 3. 'Tis the Falſity and the Malice is the Foundation and Gift of theſe Actions, and is ſo declared by my Lord *Hale* and the other Juſtices that argued with him in this Caſe; and alſo by the Court of Common Pleas in that Caſe of *Prideaux* and *Morris*.

viz. in returning that Indenture which ſhould not have been returned;

and ſo declared by Statute.

1 Lutw. 82. Far. 13. Salk. 502.

'Tis true this Caſe was adjudged for the Plaintiff in this Court, but that Judgment was reverſed in the Exchequer Chamber, ſix Judges againſt two. And tho' my Lord *Hale* was of Opinion with the Plaintiff, yet he gives one Reaſon which differs it widely from this Caſe, and that is, that he was of Opinion, that that Return was not within the Statute 23 *H.* 6. So that in that Caſe there was no other Remedy; which ſtrongly infers he would have been againſt the Judgment if it had been within that Act, as moſt undoubtedly our Caſe is.

3 Keb. 443.

1 Salk. 19. 6 Mod. 45. 8 St. Tr. 89.

As to the Caſe of *Aſhby* and *White*, as it was adjudged here, 'twas a much ſtronger Caſe than ours. For there the

Right of Election did not come in Queſtion at all. In that Caſe the Plaintiff had a meer Common Law Right, and ſo was intitled to a Common Law Remedy; and the Parliament there could only incidently examine into his Right. There ſeems to me to be a manifeſt Difference between the Right of an Elector, and the Right of an Elected; for the Elector's Right is prior in Nature and Time to the Right of the Elected. The Elected can never have any Privileges till the Electors exerciſe their precedent Right, unleſs a Body can be ſaid to have Properties before 'tis created: But ours here is a mere Parliamentary Right.

Seventhly, *Ab Inconvenienti.* I do agree, Inconvenience, where the Law is plain, is no Argument, but where it is doubtful, or in a new Caſe, it is the beſt Argument: For Man was not made for the Law, but the Law for Man. Now, the Inconvenience is very great; a Man hereby may have two Judgments againſt him at once in two ſeveral Courts; whereby one may puniſh him at the ſame Time for doing a Thing, and the other for not doing; which is very odd.

Inconvenient that a Man may be liable to two Judgments in ſeveral Courts.

By this the Officer is puniſhed three or four Times over, and without Meaſure. Firſt, he is ſent for to attend the Committee, he comes two or three hundred Miles from home at a great Expence; and leaving his Affairs to run againſt the Rocks, he brings a Train of Witneſſes with him; and after having lived upon him for two or three Months, and he upon the publick Faith as long, the Matter is decided. Upon which, perhaps, he is cenſured and committed to the Cuſtody of the Serjeant at Arms, and after having lain in Priſon during the whole Seſſion, he gets out, and goes down into the Country to his Family. He is no ſooner down, but immediately he is indicted at the Aſſiſes *criminaliter* for a Breach of the Statute of 23 *H.* 6. and is fined; then there is an Information at the Suit of the Queen for her 40 *l.* then he is arreſted *civiliter* at the Suit of the Party, and loſes 3 or 400 *l.* Damages; and after all that, any Elector may bring the ſame Action, and any Man in *England*

Hardſhips to which Returning Officers are liable.

Attendance on Parliament.

Commitment,

Indictment,

Information,

Action.

may bring a popular Action for 40*l.* on 23 *H.* 6. if the Party injured do not ſue in three Months: So that he may be puniſhed four or five, nay more times for this one Fault. And all this is to fall upon a Weaver, perhaps a Butcher, and ſometimes a Thatcher. Surely this is not agreeable to the mild and gentle Laws of *England*. And at this Rate none but Knaves and Beggars will get into theſe Offices, for none other will meddle; and this is of the laſt Conſequence to the Conſtitution of Parliaments. Officers may be over-awed as well as under-awed; and the Conſequence of that is, they will always return him that has the greateſt Purſe. If this Action prevails, it will create Thouſands, and beget Heats and Animoſities in every City and Borough in *England*; and where this new-fangled Action will end, no Man living now knows.

If Action could lie, it muſt be before the Plaintiff recovered Seat in Parliament.

There is now no Record to warrant it.

In the laſt Place, ſuppoſing it lies at Common Law, yet as the Cuſtom and Uſage of Parliament is, and as this Caſe ſtands, it is impoſſible this Action ſhould lie, unleſs the Party ſuffers the Wrong, and brings his Action before he recovers his Seat in Parliament; becauſe here is no Record to warrant ſuch Action, and this Action is brought and founded upon a Record.

The Courſe of amending Returns.

You will judicially take Notice of the Law of Parliaments, 'tis the Law of the Land, and as my Lord *Coke* ſays, ought to have the Precedency. You will then take Notice, that 'tis the Uſage and conſtant Practice of the Houſe of Commons, that when an Election is determined contrary to the Return, they ſend for the Sheriff and make him alter his Return. And then 'tis plain, the amended Return is the Sheriff's Return *ab Initio*, and then there cannot poſſibly be any Record to warrant ſuch Action for a falſe Return. So in this Caſe it appears by the Declaration, that there was a falſe Return, and that the ſame was amended and ſet right; and that it now appears upon Record, that the Mayor has returned the Plaintiff *ab Initio*; therefore 'tis not poſſible to ground an Action upon it, becauſe there is no averring againſt a Record.

No Averment againſt a Record.

Juſt ſo it is, when the Marſhal of this Court or Warden of the *Fleet* have made an improvident Return, omitting ſome Cauſes wherewith the Priſoner ſtood charged in their Cuſtody, whereby they became liable to an Action, they frequently move the Court to amend this Return, and when the Return is amended, all is ſet right. And this I find to be the Opinion of my Lord Ch. Juſtice *H.* and the Judges that argued with him.

Now, I know it will be ſaid, that this is cured by the Statute of 7 *W.* 3. 7. But that Act does not, (1) Alter the Evidence at Common Law. (2) That Act extends only to two Caſes, *i. e.* to a double Return, and to a falſe Return, contrary to the laſt Determination in Parliament. Conſtruction of St. 7 *W.* 3. 7.

It ſays, the Clerk of the Crown ſhall enter every Return in a Book, and every Amendment, and that Book ſhall be given in Evidence, or a Copy of it; but then it goes on and ſays, that the Party ſhall have the like Advantage of ſuch Proof as he might have had by producing the Record itſelf. So that this does not ſupply any Defect of Evidence, but only facilitates it, becauſe it might be difficult to produce the Record itſelf. And this appears from the precedent Words, which are for the more eaſy and better Proof, which ſhews nothing was intended to be altered. They are only by this to have ſuch Advantage, as they might have had by producing the Record; now what is that? that, if now produced, or at the Trial, would only ſhew that the Plaintiff was elected and returned, and no leſs.

(2.) This Act extends only to the two Caſes provided for in the Act; for there are no other Caſes mentioned in the Act, but theſe two which I mentioned before, which is not our Caſe. There 'tis all along expreſſed in the ſingular Number, and ſaid expreſsly for the more eaſy Proof of any *ſuch* falſe and double Return: It is not ſaid falſe and double *Returns*, in the plural Number; for then it might be applied

to

to falſe Returns in general. But ſuppoſe this Act did extend to our Caſe, yet this Book, or Copy of this Book, is only to come in the Room of the Record, and muſt now be eſteemed as ſuch. But ſtill the Returns in this Book are altered juſt as the Return of the Writ is, and no otherwiſe; ſo that there is no more appearing on this Book than there is in the Return itſelf; for he is only to ſet down in this Book what the Return of the Writ is, and what the Amendment; and when amended, there is no more appears on this Book than on the Return; for indeed 'tis no more than a Copy of the Return amended, which muſt be of the ſame Nature with the Original: Therefore they are ſtill never the nearer, for this Book being amended is now ſet right; and the amended Return own'd upon the Book, is the Sheriff's Return *ab origine*.

Upon the whole, I hope I have ſhewed that this Action does not lie at Common Law; that it is without Precedent at Common Law; that the Injury, if any, is Parliamentary; and ſo is the Right; and that the Remedy is therefore Parliamentary; and that the Houſe of Commons have a proper Juriſdiction, and have always exerciſed it in Matters of this Nature. That to allow this Action to be maintainable at Common Law would be attended with many and great Inconveniencies; and finally, that as this Caſe is, the Declaration cannot be ſupported without allowing an Averment againſt a Record; which the Law will not indure. I therefore humbly hope that Judgment ſhall be arreſted.

This Matter was argued by Serjeant *Parker*, afterwards Earl of *Macclesfield*, and others, for the Defendant; and by Mr. *King*, afterwards Lord *King*, and others, for the Plaintiff; and in *Eaſter* Term *6 Annæ*, the Chief Juſtice delivered the Opinion of the Court.

Holt. Ch. J. Judgment arreſted *per tot. cur'*.

Chief Juſtice *Holt*: Judgment muſt be arreſted; for, this Action does not lie. The Houſe of Commons has gi-

ven Judgment for him, ſo that the Action cannot be for a falſe Return; the proper Remedy is in the Houſe of Commons, and we cannot meddle with it; but they can cauſe Returns to be altered, and then they become the ſame as if the Perſon was originally returned. To maintain this Action is againſt the Record itſelf; the Record is ſet right and is returned by the proper Officer, and every body is eſtopp'd to ſay he was not returned, becauſe it is now good *ab initio*. *Soams* and *Barnardiſton* is a Caſe in Point. There Judgment was for the Plaintiff, but a Writ of Error was brought, and the Queſtion there was, Whether an Action of the Caſe would lie againſt a Sheriff for making a double Return upon a Writ to elect a Member of Parliament? the Plaintiff declaring *falſo & malitioſe ad damnum* 1000 *l.* and 800 *l.* Damages given; and this was moved in Arreſt of Judgment, and argued at *Serjeants Inn* before the Judges of the Common Pleas and Barons of the Exchequer; and the Judgment given in the King's Bench was reverſed: They went on the Reaſon of this Caſe, and that no ſuch Action ever lay. If the Sheriff made a double Return in any other Caſe, 'tis no Return, and not like a Return in Parliament, which by Order of Parliament may be altered; and then it is legal *ab initio*. To ſay 'tis true to one Purpoſe and falſe to another is ridiculous and a Contradiction: Nor is this any Action upon the Statute; you ſay *in placito tranſgr' ſuper caſum*, which is very different from an Action upon a Statute. It cannot well be both an Action on the Caſe and an Action on a Statute too; you need not recite the Statute if it be a publick Law, if you bring yourſelf within the Act; and if you do not conclude *contra formam ſtatuti*, you muſt ſhew it at leaſt by your concluding *de placito tranſgr' & contemptus*.

Freeman's Reports 430.

Powell: That does not appear on this Record; my Reaſon for being of the ſame Opinion, is the Caſe of *Soams* and *Barnardiſton*, as long as that Caſe is Law I muſt judge ſo, if that Caſe was out of the Way I might be of another Opinion.

Powell.

Powis. *Powis ad idem* for the ſame Reaſon: *Soams* and *Barnardiſton* is in Point; beſides, if the Plaintiff can have this Action, ſo any other may bring the Action, and then the Defendant will be doubly puniſhed for the ſame Crime; to ſave the Statute of Limitations, the Party may file his Original.

Gold. *Gold ad idem: Soams* and *Barnardiſton* is in Point, it cannot be an Action upon the Caſe and upon the Statute too.

DE
Term. Sanct. Trin.
3 *Annæ Reginæ.*
In the KING'S BENCH.

Anonymus.

Indictment for not taking the Office of Conſtable, what it ought to ſhew. Salk. 175, 380, 502.

INdictment for not taking on him the Office of Conſtable; it ſets out that he was qualified for a Conſtable, and duly elected; and had Notice, yet would not take on him the Office. *Objected*, That it does not ſet out by whom and how he was elected, nor that they had ſummoned him to go before the Juſtices to ſwear him; and it was quaſhed *per Cur.* cited *Allen* 78. *Trin.* 7 *W.* 3.

The Queen verſus *Wyat.*

Indictment againſt a Conſtable for not returning a Warrant to levy a Penalty;

THIS was an Indictment againſt a Conſtable for not returning the Warrant of a Juſtice of Peace to levy the Penalty on a Conviction of Deer-ſtealing. Removed *per Certiorari* into the King's Bench.

the Difference between ſuch Warrant and a *Fieri Facias*.

1*ſt Excep.* It is not ſaid at what Time and Place the Warrant is to be returned, for that he is not obliged to run over the Kingdom to find out the Juſtices; beſides, he ought to keep the Warrant for his own Juſtification, and it is not like a *Fi' Fa'*, which is a Record, and may be referred to; a *Fi' Fa'* indeed muſt be returned, becauſe if Part be levy'd, the Plaintiff may have another Writ for the reſt; but here that cannot happen, for the whole muſt be levy'd

or

or none at all, for they cannot levy for Part of the Penalty, and the Defendant ſtand in the Pillory for the Reſidue; they muſt either be content with Part, or he ſtand in the Pillory for the whole.

2*d Excep.* The Act does not direct that the Warrant ſhall iſſue to the Conſtable, but is ſilent as to the Perſon that is to levy the Money; and yet this Warrant is directed to the Conſtables of the Hundred, being to all Conſtables.

Thirdly, You do not conclude, after having recited ſeveral Records, *prout patet per Recordum.*

Fourthly, Here is a Miſtrial; it is ſaid where the Warrant was delivered, but not ſaid where the Neglect was; and it ought to be tried where the Neglect was, or ſaid where the Neglect was, and not tried there.

Fifthly, It is ſaid *contra Pacem* of the late King, but ought to be ſaid *contra Pacem* of the Queen alſo; becauſe the Neglect, tho' it began in the King's Time, yet it continued in the Queen's Time alſo, the Return being never made at all; ſo was an Offence againſt both Queen and King.

Gold. Conſtables of Hundred are proper Officers of Juſtices of Peace.

Gold, Juſtice: The Act directing the Money to be levied, it muſt be done by the Officer that uſually executes the Warrants of Juſtices of Peace; and the Conſtable of the Hundred is as much the Officer of Juſtices of the Peace, as the Conſtable of a Vill or Pariſh.

As to the Miſtrial, he quoted the Caſe of 1 *Keb. 696. King* and *Ch. W. of St. Clement's Danes*; and held it to be none.

Powis. 'Tis an Offence not to return the Warrant.

Powis, Juſtice, concurred, and ſaid it was a great Offence to levy the Money, which was done in this Caſe, and then to keep it in his Hands; he ought to make a Return of this Warrant, to acquaint the Juſtices what was done upon it, becauſe if the Money could not be levied, ſomething more was to be done upon it; there was a ſort of ſecond Judgment, to be put in the Pillory. 2 *R. Rep.* 78.

And here is no Miſtrial, tho' Warrant delivered at *F.* and the Neglect is laid to be at another Place, the *Ven' Fa'* is proper enough out of *F.* being the principal Place; and the Conſtable is the Officer principally meant in this Act of Parliament.

Powell, Juſtice: This is an Offence at Common Law, neglecting to execute the Office of a Conſtable, and an Indictment lies at Common Law; and it is not founded on the Act of Parliament; otherwiſe, than by this Act, it is made Part of his Duty to execute Warrants of Diſtreſs in this particular Caſe.

It is true the Act does not ſay, theſe Warrants ſhall be directed to Conſtables; but Conſtables are known Officers of Juſtices of the Peace to execute their Warrants; and therefore the Law ſays, they, who are proper Officers, are to execute theſe Warrants, ſince the Act is ſilent.

Conſtables are Officers at Common Law, and were Conſervators of the Peace, but never Judges of Record; but when Juſtices of the Peace were made Judges of Record, Conſtables became ſubſervient to the Juſtices, and became known Officers ever ſince, and are Officers in all Things where the Juſtices have any thing to do.

Conſtables are Officers at Common Law, of what Nature?

The Sheriff has nothing to do in this Caſe, he being the Officer of the Courts of *Weſtminſter Hall*; and 'tis abſurd to ſay, the Party himſelf is to be Officer: Therefore, the Conſtable, who is the proper Officer who uſually executes ſuch Warrants, is by Law compellable to execute this.

The Sheriff has nothing to do in this Caſe.

But then 'tis objected, that this Warrant is directed to Conſtables of the Hundred; and that they are not the proper Officers, but *petit* Conſtables are the proper Officers; and for that the Authority of my Lord *Coke*, in 4 *Inſt.* is quoted, which ſays, that High Conſtables were not at Common Law, but appointed by *Stat. Winton*, for a ſpecial Purpoſe: But that Authority has been denied for Law; for a High

High Conſtables were Officers at Common Law.

Authority of 4 *Inſt.* denied as to this Point.

a High Conſtable is an Officer at Common Law, and there were Conſtables of Hundreds at Common Law as well as petty Conſtables.

My Lord *Hale* is of this Opinion, That High Conſtables were at Common Law, and that the Statute of *Winchester* only gave them a greater Authority; and in 3 *Keb.* 131. *King*'s Caſe, he declared that Authority of my Lord *Coke* was not Law.

Where not neceſſary to vouch a Record in Pleading.

As to the 3*d Exception*, There is no Need of ſaying *prout patet per Recordum*, where it is only Inducement, as here, and not the principal Point and Giſt of the Caſe; this is only to ſhew the Court what Sort of Neglect in his Duty it was, and on what the Neglect was founded; and where it is the Point of the Caſe, *Nul tiel Record* might be pleaded, which here could not, becauſe it was his Duty to execute the Juſtices Warrant, though they had made no legal Record; which the Officer cannot diſpute. It is neceſſary to have a Return of this Warrant, to know what is done thereupon, and he is to make a ſpeedy Return.

Where a *Venue* ought to be out of two Places, or not?

As to the Miſtrial, I think it is none; for tho' *Venue* muſt come out of both Places, where two Places are named and both material to the Iſſue, yet where one only is material to the Iſſue, tho' the other Matter be required to be given in Evidence, yet it is enough if the *Venue* come out of that one Place. *Hob.* 305. *Hutt.* 39. *Cro. Ja.* 231. Sir *W. Jones.*

As to the Place of the Return, I believe no Place is ever mentioned; he is an Officer, and may find out his Maſters the Juſtices, and he might excuſe himſelf if he could not find them; we muſt preſume the Juſtices meet to do Buſineſs as uſual, and as they ought to do.

Holt, Ch. J. Conſtables are made ſubject to Juſtices of Peace by Act of Parliament.

Holt, Chief Juſtice: Conſtables are the proper Officers, and this Indictment well lies; and Conſtables are made ſubject to the Juſtices of Peace by Act of Parliament; but I think a Place ought to be appointed for the Return, for

elſe he muſt run over all the County to ſeek out the Juſtices; all Proceſs ſhews this; Proceſs in this Court is *coram Domino Rege*; if by Original, 'tis *ubicunque fuerimus in Angl'*; if by Bill, at *Weſtminſter*. Not only a Day, but a Place, to take Notice where the Court is reſident; and 'tis much more neceſſary when Proceſs comes from Juſtices of Peace. You ought alſo to ſet out the Time of the Return of this Warrant; you ſay it was delivered before the ſecond of *September*, and that it was returnable at a Day then long ſince paſt; but it ought to appear that the Delivery was after the Teſte and before the Day of the Return; for if it was delivered after the Return, he was not bound to give any Account of it, becauſe the Warrant was void.

But I think the Indictment would have been better if it had been laid not for the omitting making a Return, but for neglecting the Execution of this Warrant; for if he had levied the Money, and had not delivered it over, he had not done his Duty. It appears plainly where the Neglect was, where could it be but in the Pariſh where he was Conſtable? ſo that here is no Miſtrial, and the Law is ſo as Brother *Powell* has mentioned.

High Conſtable an Officer at Common Law.

As to the Point of the High Conſtable not being the proper Officer, I am of the ſame Opinion: In 3 *Cro. Sherwood* and *Hanmore*, the Queſtion was, Whether a High Conſtable could arreſt for Breach of the Peace; and held there he could not, becauſe he was no Officer at Common Law, but conſtituted by *Stat. Winton*; but that Caſe has been contradicted, and held to be no Law, in that Caſe in my Lord *Hale*'s Time, where it was held he was an Officer at Common Law, and has as much Power as the petty Conſtable has.

As to the Exception of *contra Pacem*, I ſuppoſe it would be neceſſary to ſay *contra Pacem* of the Queen as well as King; where that is neceſſary; but here the Indictment being founded on an Omiſſion, it is otherwiſe, and there you never conclude *contra Pacem* at all.

But

Warrants when and where to be returned.

But my Lord Chief Juſtice in the Argument of the Caſe, ſaid, You need not ſhew when or where it was to be returned; *when*, that is as ſoon as conveniently he could, and *where*, i. e. any where in the County; and he might have excuſed himſelf by ſaying he could not find the Juſtices, and had been ready, that would have been an Excuſe on the Trial.

I think the Officer might have paid the Money over as the Act directs, and need not to give it to the Juſtices, for the Juſtices have no more to do after the Money is levied.

In what Caſes the Offender ſhall ſtand in the Pillory on Non-payment.

That the Conſtable may keep his Warrant.

This Matter in Queſtion a great Offence.

If there be two Convictions againſt one Man, and he can pay one Fine and not the other, he ſhall ſtand in the Pillory for that where he cannot pay; but if one Conviction only, and he want 20 *s.* only of the full Penalty, he ſhall keep his Money and ſtand in the Pillory. He ſaid that the Conſtable might have certified what he had done on the Warrant, and needed not to have parted with his Warrant. And *Holt* ſaid in the Concluſion, that his three Brothers being againſt him, Judgment muſt be for the Queen; and ſaid it was a ſmall Offence, but the reſt ſaid it was a great one, becauſe by that Means the Execution was avoided, and therefore he was fined 200 *l.* which he paid down in Court rather than ſpeak with the Proſecutor.

DE
Term. Sanct. Trin.

11 *Annæ Reginæ. Rot.* 220.

In the KING'S BENCH.

Backhouſe and *Wells.*

THE Caſe was, *Thomas Backhouſe* deviſed Lands to *John Backhouſe* for his Life *only*, without Impeachment of Waſte, and from and after his Deceaſe then to the Iſſue Male of his Body lawfully to be begotten (if God bleſs him with any) and then goes on, with Remainder to the Heirs Male of the Body of ſuch Iſſue lawfully to be begotten, with two Remainders over in the ſame Words.

Deviſe to *A.* for Life only *ſans* Waſte, Remainder to Iſſue Male of his Body lawfully to be begotten, Remainder to the Heirs Male of the Body of ſuch Iſſue, *&c.*

Whether it be an Eſtate for Life, or an Eſtate-Tail? Eq. Abr. 184. pl. 27.

Fazakerley: This is no Eſtate-Tail but an Eſtate for Life. The Word *Iſſue* may be expounded ſo as to ſquare with the Intention of the Deviſor. 6 *Co. Wild*'s Caſe, *Children* ſtand for *Iſſue.* 3 *Lev.* 431. *Lodington* and *Kyme*, there *Iſſue* made a Word of Purchaſe.

Fazakerly, that it is only for Life.

The Deviſe is to *B.* for Life *only*, without Impeachment of Waſte, and after to his Iſſue: He has here expreſſed that he ſhall have an Eſtate for Life only, and ſo the Preamble of the Will ſhews the ſame Intention; ſo the Court may mould the Word *Iſſue* to ſerve the Intention of the Party. 10 *Co. Chancellor of Oxford*'s Caſe. 1 *Vent.* 231.

Implication muſt not prevail againſt expreſs Words.

Now, if this be an Eſtate-Tail, it muſt be by Implication and that muſt never prevail againſt expreſs Words. 3 *Leon.* 71. Let the Implication be ever ſo ſtrong, it muſt give way to expreſs Words. 3 *Cro.* 498.

It is diſpuniſhable of Waſte, which ſhews he meant an Eſtate for Life only, 3 *Lev.* 431. 2 *Co.* 23. then to his Iſſue Male, if God give him Iſſue; which Words are future, if God ſhall give him Iſſue hereafter, *Moor* 464. and the ſubſequent Words are *to the Heirs Male of the Body of his Iſſue*; this ſhews the firſt Words are only *Deſignatio Perſonæ*, and conſequently Words of Purchaſe, and not of Limitation. 2 *Bulſ.* 178. There the Rule of Law is laid down, that no Clauſe in a Will ſhall be conſtrued Nugatory.

No Clauſe in a Will to be conſtrued Nugatory.

Caſes nearer this, are *Clerk* and *Day*, 3 *Cro.* 313. *Moor* 593. *Archer*'s Caſe, 1 *Co.* 66. *Cro. Eliz.* 453. 1 *Roll. Abr.* 626.

3 D'Anv. Abr. 172. pl. 1. 3 D'Anv. Abr. 181. pl. 16. Eq. Abr. 181. pl. 16.

Iſſue Male is the ſame as *Heirs Male*; *Loddington* and *Kime*; Body is relative to one as well as the other. Beſides, the Deviſe is to *B.* for Life only, without Impeachment of Waſte, and the next Remainder to *J. B.* is to him and the Heirs Male of his Body; and if he had intended the ſame Limitation he would have uſed the ſame Words; *B.* had no Iſſue at that Time. The Caſe of *Taylor* and *Sayer* in *Cro. Eliz.* 742. is a Caſe in Point, if it be Law. 2 *And.* 134. *pl.* 81. *Godb.* 302.

2 D'Anv. Abr. 514. pl. 2. 3 D'Anv. Abr. 182. pl. 19. Eq. Abr. 212. pl. 3.

Jeffries, that it is an Eſtate-Tail. 1 Vent. 214, 225.

Jeffries argued *econtra:* This is an Eſtate-Tail; in *Roll. Abr.* 837. the Words *non aliter* in that Caſe is ſtronger than the Word *only* in this Caſe. *King* and *Melling*, the Word *only* is unneceſſary, and will not alter as the Clauſes in that Caſe. *Lutwych* 84. *Broughton* and *Langley*, the Intention of the Party is nothing here, becauſe not conſiſtent with the Rule of Law, for that muſt not break thro' the eſtabliſhed Rules of Law. *Archer*'s Caſe is not like this Caſe, that was next *Heir*, in the ſingular Number, ſo could not be an In-

Salk. Rep. 679. Eq. Abr. 383. pl. 3. Intention of the Party not to break thro' the Rules of Law.

heritance. *Counden* and *Clark*, in *Hob.* 29. there was an Eſtate-Tail by Implication; *Iſſue* is *Nomen Collectivum*, and what is grafted is not different, which muſt be as *Shelly*'s Caſe.

2 D'Anv. Abr. 556. pl. 1. 3 D'Anv. Abr. 213. pl. 10. 2 Rol. Abr. 416. pl. 4. Cro. El. 313.

Chief Juſtice *Parker:* The Caſe of *Clerk* and *Day* is miſtaken in all the Books. In the Caſe of *Loddington* and *Kime* there was Judgment, but a Writ of Error was brought in this Court, and the Parties agreed and divided the Eſtate between them; and *Levinz* hath miſtaken this Caſe tho' he argued it.

That it is for Life only. Salk. 224. 3 D'Anv. Abr. 183. pl. 24.

This is to him for Life, and Remainder in Tail to his Iſſue; this being in a Will, what is there to alter this? Intent ſhews he deſigned it ſo, and therefore he has added the Word *only*; what is here to controul the Intent of the Party? *Iſſue Male*, 'tis ſaid, is equivalent to *Heirs Male of the Body*; that is not ſo in all Caſes, in ſome indeed it is, but it will do you no good, unleſs it be ſo in all Caſes.

Deviſe to one for Life, and after his Death to his Iſſue, if there be no Iſſue, cannot make it a preſent Eſtate; and a Remainder it cannot be, becauſe nothing limited in certain, therefore you muſt explain *Iſſue* otherwiſe than it imports directly, that the Intent of the Party may not be fruſtrated.

Indeed *Hale* does call Iſſue *Nomen collectivum*, *i. e.* extending to the remoteſt as well as to the neareſt Iſſue, but the Intent of the Party muſt co-operate, where *Iſſue Male* is equivalent to *Heirs Male.*

Deviſe to one for Life, and to his Heir Male, *Legate* and *Sewell*, that would be *Archer*'s Caſe; the Intention of the Party ſhall controul the Operation of Law where it may, but indeed where it is a Deviſe for Life only, and to the Heirs of his Body, that would not alter the Operation of Law. *Ulterius Concilium.*

2 Vern. 551. The Intention of the Party ſhall controul the Operation of Law, where it may.

In *Michaelmas* Term 12 *Anne* this was argued again.

Lutwyche:

Lutwyche, that it is for Life only.

Lutwyche: The Queſtion is, Whether *J. B.* be Tenant for Life, or Tenant in Tail. If Tenant for Life only, he could not ſuffer a common Recovery; and in ſuch Caſe that will not prejudice our Title who claim in Remainder. I make two Points.

Two Queſtions.

Firſt, Whether it be not the Intent of the Teſtator, that it ſhould be an Eſtate for Life only?

Secondly, Whether that Intent be not here agreeable to the Rules of Law?

That it is the Intention of the Devifor to give for Life only.

Where an Eſtate is to be ſettled in the Blood, it is Prudence in every one to give an Eſtate for Life; theſe Words are very ſtrong, *Habend'* for Life only; this Word *only* is very material, and on which other Caſes turn. This could be for no other Purpoſe but to give him an Eſtate for Life only, and that without Impeachment of Waſte. This is not like the Caſe of *King* and *Melling*, there was Power to make a Jointure, that Power has a different Signification; but here, for Life *only*, without Impeachment of Waſte, can have no other Signification, and is to no Purpoſe, unleſs to confine it to an Eſtate for Life.

1 Vent. 214, 225.

He ſhews how it ſhall go to the Tenant for Life, and to the Iſſue; for he takes Notice he had no Children, ſo that is contingent; and if he has Iſſue, then 'tis veſted in the Iſſue as a Purchaſer; and then to make him take as ſuch, he adds Words of Limitation, which ſhews the firſt are Words of Purchaſe.

If this Limitation were in a Deed, it would be good, as *Shelly*'s Caſe; Remainder to the *Iſſue* would be a Word of Purchaſe even in a Deed, it would be to them for their Lives; and if Words of Limitation were added, it would be a Fee; if here be proper Words of Limitation how can it be conſtrued otherwiſe, if it ſhould be ſo, he is in a worſe Caſe for underſtanding the Law.

1 Co. 93.

Where Words are proper ſo as to carry an Eſtate in a Deed, nothing ſhall alter that Caſe but the expreſs Intention of the Party. In *Wild*'s Caſe, a Deviſe to *A.* and his Children, having none at that Time, it is reaſonable to conſtrue that to be an Eſtate-Tail; becauſe, having no Children at that Time, the Words *to his Children*, could not be ſatisfied any other Way than by making it an Eſtate-Tail. 6 Co. 16. Moor 397.

If we anſwer the Caſe of *King* and *Melling*, there is no other Caſe againſt us; and there is a great deal of Difference between that Caſe and ours. In that Caſe, my Lord *Hale* took Notice that *Non aliter* in *Roll. Abr.* 897. made a Difference, and the Clauſe without Impeachment of Waſte was not in that Caſe, nor the Word *only*; here are alſo Words of Limitation added to Words of Purchaſe, and in that he diſtinguiſhes as much as any Lawyer could do. *Lodington* and *Kime* is a Caſe for us, but the Caſe of *Taylor* and *Sayer* has been denied to be Law. 1 Vent. 214. Cro. El. 742. 2 And. 134. p. 8. Godb. 302.

Lechmere: This is the ſame Caſe as *King* and *Melling*; the Intention of the Party I agree to be the Meaſure of Conſtruction. *Lechmere*, that it is an Eſtate-Tail.

Here is no ſuch Intention that this ſhould be an Eſtate for Life only; the Preamble of the whole Will is againſt it: He deſires that all the Lands may go in his Name and Blood, and this muſt extend to all the Deviſes in the Will; the Reaſon why this firſt Deviſee was preferred, was becauſe he was of the Name and Blood. Now, if the Operation of Law be upon theſe Words, that he ſhould have no Power to alien, would not that extend to the ſecond Deviſee, in Point of Intention, as well as to the firſt? The ſecond has not his Name tho' of his Blood, but he has Power to alien, why not then the firſt? The ſecond Deviſe is to *B.* an Attorney, for Life, and then to the Heirs Male of his Body, this is an Eſtate-Tail; the Clauſe without Impeachment of Waſte, they ſay, is proper only for an Eſtate for Life; but he has uſed theſe Words otherwiſe in his other Deviſes, where 'tis clearly an Eſtate-Tail; and therefore theſe Words are to be

deemed ſuperfluous, he uſing them promiſcuouſly, he muſt be intended to mean the ſame Thing by the ſame Words; if he had any particular Meaning that he ſhould not alien, he would have gone through with it in all the Deviſes. In that Caſe of *Lodington* and *Kime* there is a Proviſo. But then they ſay here are additional Words, *to the Heirs Male of the Body of ſuch Iſſue.* In a Will, a Deviſe for Life, Remainder to his Iſſue, that makes an Eſtate-Tail in the Deviſee, and then the additional Words *to the Heirs of the Body*, are mere Words of Surpluſage. Such a Limitation in a Deed where Iſſue is in Being, might be ſo, but in a Will it is otherwiſe; for tho' all the Iſſue ſhall take, yet they ſhall all take an Eſtate-Tail and by Deſcent. *Archer*'s Caſe is the ſame as if the Deviſe had been to the firſt-born Son; that of *Lodington* and *Kime* was in the ſingular Number, to the firſt Iſſue Male and his Heirs, *i. e.* firſt-born Son and his Heirs. So is the Caſe of *Clerk* and *Day*, it is in the ſingular Number. His general Intention is the beſt Meaſure that it ſhould go to his Name and Blood.

3 D'Anv. Abr. 183. p. 24. Salk. 224.

1 Co. 66. 3 D'Anv. Abr. 181. pl. 16. Cro. Eliz. 453.

As to the Word *only*, in the *King* and *Melling*, there are expreſs Words for Life, which were held to have no Weight in that Caſe, for this Word *only* has no particular Meaning here; when applied to general and indefinite Words, this Particle of Reſtriction has its Uſe, but if the ſame Senſe is expreſſed before, no other Words can make it more ſo; the Expreſſion was limited before, ſo this Word coming after does not vary either the grammatical or literal Meaning; and if this Word has no Meaning, then 'tis the ſame Caſe as *King* and *Melling*.

In *Roll. Abr.* 837. there is a Caſe ſomething like this; the Reaſon given there was, becauſe it was expreſsly ſaid to be an Eſtate for Life. In *Clerk* and *Day*, *Roll. Abr.* 839. if Son ſhould alien, then to the Daughter; that ſhews the Power of Alienation was in the Son and not in the Father.

Cro. Eliz. 313. 3 D'Anv. Abr. 172. pl. 1. 189. pl. 4.

Iſſue its Conſtruction in a Will, and in a Deed.

The Word *Iſſue* is not appropriated in a Will, tho' in a Deed it has an appropriated Senſe; *Iſſue* is a proper Word of Limitation; as a Deviſe to *A.* generally, and if he die without

out Iſſue, that makes an Eſtate-Tail by Force of the Words and Expreſſion. The general Intent is, that the Iſſue ſhould have it; the Word *Iſſue* in a Will is more frequently conſtrued to make an Eſtate-Tail. Even in a Deed it has that Meaning, *and for Want of ſuch Iſſue*, that reſtrains it to an Eſtate-Tail.

A Deviſe to *Men Children* of the Body, is not ſo operative as *Iſſue*; and the Reaſon of *Wild*'s Caſe was, that it appeared there was Iſſue living. There is not one Reaſon in the Caſe of *King* and *Melling* but what is here; and as to the grafted Words they ſignify nothing; the Word *Iſſue* is as often a Word of Limitation as a Word of Purchaſe, and is to have a Conſtruction as the Occaſion offers.

In the next Term, which was *Hill.* 12 *Annæ*, the Chief Juſtice gave the Reſolution of the Court in this Caſe.

Ld. Ch. Juſtice *Parker:* The Queſtion is, whether this be an Eſtate for Life or an Eſtate-Tail? It is an Eſtate for Life, and not an Eſtate-Tail. I don't know how there can be clearer Words than theſe; the Words are proper and legal, and ſuch as a Lawyer would make uſe of, and the vulgar Senſe of the Words is the ſame as the legal Senſe.

Parker, Ch. Juſtice. Reſolved to be an Eſtate for Life only.

The Word *Iſſue* has been made equivalent to *Heirs* of the Body, but that is not always ſo; for otherwiſe here the ſubſequent Words of Limitation muſt be rejected. One may indeed gueſs from other Parts of the Will what the Party might mean, but that is no concluſive Argument.

As to the Word *only*, that is, in ſome Caſes that may be put, of no Effect; but tho' in a clear Caſe it may make no Alteration, yet it does not follow, but that in a doubtful Caſe it may be explanatory and reſtrictive. You would change the Senſe of the Word *Iſſue*, only to reject the ſubſequent Words. Stronger Words could not be invented to make the Iſſue in Tail take as a Purchaſer, than the Words in this Caſe; and ſo Judgment was given for the Plaintiff *per tot' Cur'*.

D E

DE
Term. Sanct. Mich.
10 *Annæ Reginæ.*
In the KING'S BENCH.

The Queen verſus *Derby.*

Whether a Secretary of State may lawfully commit a Libeller without Oath? &c.

THE Defendant was a Printer, and was committed in the Vacation by a Secretary of State, and on a *Habeas Corpus* returnable before Chief Juſtice *Parker* at his Chamber, he was brought before the Chief Juſtice, and entered into a Recogniſance to appear the firſt Day of the Term.

On that Day he appeared in the King's Bench, and moved by his Counſel Mr. *Lechmere* to be diſcharged, taking ſeveral Exceptions to the Commitment.

The Warrant appeared to be, to authorize a Meſſenger forthwith to make ſtrict Search for *Derby* the Printer, and to ſeize and ſecure him for publiſhing and vending a ſcandalous and ſeditious Libel called *The Obſervator*, N° 74. and to bring him in ſafe Cuſtody before me to examine the Premiſſes, and to be farther dealt with according to Law.

1ſt Exception; that no Commitment ought to be for a Libel, until Indictment, &c.

Firſt Exception was, That for a Libel a Secretary of State could not commit; but he agreed the Power of a Secretary of State to commit for Treaſon or Felony; and that a Meſſenger was a proper Officer; both Points being adjudg'd in the Caſe of *The Queen* and *Kendal* and *Roe*, *Salk.* 347. 5 *Mod.* 78.

Becauſe it was no Offence on which a Commitment might by Law be, 'till Indictment or Preſentment; that this was an Inhibition againſt all Bail, and that Commitments were Puniſhments only after Conviction, and not before; and without Hearing and without Oath to be ſeized and ſecured, is hard. That 25 *Ed.* 3. *cap.* 4. ſays, no Man ought to be impriſoned but by Preſentment, Indictment, or by Proceſs of Law; and that laſtly, the Defendant offered the Meſſenger 10000 *l.* Bail, but it was refuſed, ſaying, he had Orders to bring him in Cuſtody.

Bail was offered to the Meſſenger and refuſed.

Second Exception: Here is no particular Offence ſet out, 'tis only ſaid in general Terms, for a Libel called *The Obſervator*, N° 74. In High Treaſon, it is no Eſcape if the Cauſe of Commitment do not appear in the Warrant. 3 *Car.* 1. is the Foundation of the Bill of Rights; Miniſters of State ſheltered themſelves by urging it was *per Mandatum Domini Regis*; this falls ſhort of that, for here is no Colour at all; the Paper is commendable, it is a Tranſlation of *Tacitus*, where he talks of an angry addle-headed Projector: *Mente turbida* is the Expreſſion.

2d Exception; That no particular Offence is ſet out.

Third Exception: That the Concluſion is naught, becauſe here is no Time fixed, when he is to be brought before the Secretary; ſo the Time being indefinite, it is a Commitment during Pleaſure.

3d Exception; That the Time is indefinite.

Fourth Exception: That he is to be brought before him to be examined; ſo that a Secretary's Office is to be turned into a Court of Inquiſition, where he is to be compelled to make Confeſſion.

4th Exception; That he ought not to be compelled to be examined.

Then the Counſel for the Priſoner offered Affidavits, but the Court rejected them.

In Anſwer to the Objections, it was ſaid by the Attorney and Solicitor General, that if theſe Objections prevailed, it would make an End of all Warrants of Juſtices of

Anſwer to the Objections; This Warrant not a Commitment.

of Peace; and that this Warrant was not a Commitment, but only what was neceſſary in order to his being examined; and that a Juſtice might order to have him kept a reaſonable Time to be examined; That by the Act of Spreaders of falſe News, he may be detained 'till he diſcover the Author; that a Warrant was only to notify the Crime in general; nor was there ever any ſuch Thing as a Time fixed in any Warrant whatever to come before a Magiſtrate. It was ſaid alſo, that he could not now take Exception to the Commitment, becauſe he had entered into a Recogniſance to appear; ſo that he had acquieſced, and had got his Liberty by it; and it was alſo inſiſted, that were he never ſo innocent he could not be diſcharged the firſt Day of the Term, for that the conſtant Practice of the Court was otherwiſe; the true Queſtion here, is only, Whether a Secretary of State cannot ſend for an Offender to examine him, which ſurely he may; ſuppoſe this were a Libel, is there any other Method in the World to fetch the Party before him but this? and as to Bail being offered and refuſed, that can be no Objection, becauſe a Meſſenger cannot take Bail, having no Authority ſo to do if it were offered. It is agreed a Secretary of State may ſend for a Perſon to examine him for High Treaſon, why not for a Miſdemeanor? the Reaſon is the ſame. The Meaning why the Species of Crime is ſet forth in the Warrant, is, that it may appear the Juſtice and Magiſtrate has Juriſdiction.

There ought to be a reaſonable Time for Examination.

That it is too late to except to the Commitment after entering into Recogniſance.

That a Secretary of State may ſend for an Offender to examine him.

A Meſſenger cannot take Bail.

If a Secretary may examine for high Treaſon, *a fortiori*, &c.

Offence ſet out, that Juriſdiction may appear.

Chief Juſtice *Parker:* The Defendant cannot be diſcharged, and the Warrant is good and legal. Suppoſe there be an Information to a Juſtice of Peace that one is a Felon, may not he ſend a Warrant to have him come before him? If the Officer muſt obey the Warrant, (as he muſt) he muſt ſeize him, and muſt ſecure him only for that Purpoſe, and this is nothing more. To have him examined is a Privilege, and for the Benefit of an innocent Man; for perhaps on the Examination he may clear himſelf, and then he will be diſcharged: nay,

Parker, Ld. C. J. The Warrant is legal.

Examination may be for the Defendant's Benefit.

in the Caſe of Felony, the Juſtice of Peace is bound to take his Examination.

But 'tis ſaid, there ought to be a Time fixed for his Examination. This was never done in this World, in any Warrant whatever, nor is it poſſible to do it without a manifeſt Injury to the Party; for ſuppoſe, for the Purpoſe, a Fortnight ſhould be limited, the Party then muſt be in Cuſtody all that Time, and perhaps he might be diſcharged the very firſt Day, and certainly would, if he did appear and was found innocent. The Law has already fixed a Time; for by Law the Officer is bound to carry him immediately before the Magiſtrate: If he delay any Time, it is againſt the Duty of his Office.

No Time for it is ever fixed; if it were, it might be to the Prejudice of the Defendant.

As to ſetting forth the Crime in the Warrant, that is well enough; for the Warrant is to ſet forth the particular Species of Crime, but not the particular Facts of that Crime; as in a Warrant for Felony, you need not ſet out in the Warrant the particular Goods ſtolen. In the Caſe of *The Queen* and *Kendal* and *Roe*, the priſoner was not diſcharged, tho' they held the Warrant not ſufficient to charge him with High Treaſon; but they bailed him to appear to a Charge for aſſiſting one to eſcape for High Treaſon. If it were for High Treaſon, then he is not bailable: But when the Species of Crime does not appear, it does not appear to us he is not bailable, and therefore we bail him. Here the Crime does appear, and he gives Bail to be forthcoming in order to examine this Matter; it is only in order to a Proſecution.

The Species of the Crime is in the Warrant, and that is ſufficient.

Juſtice *Powis:* 'Tis a Privilege to be examined, which is not allowed in other Countries; where a Warrant is to bring one before a particular Juſtice, the Officer may carry him before another, if he be a nearer eſpecially.

Powis J. 'Tis a Privilege to be examined.

Juſtice

Eyre, J. The Warrant is legal.

Juſtice *Eyre:* He cannot be diſcharged: A Secretary of State has a Power to iſſue a Warrant; 'twas held ſo in the Caſe of *The Queen* and *Kendal*, and ſettled in Queen *Elizabeth*'s Time. The Species of Crime is ſet forth, which is enough, it need not ſet forth the Facts, as on whom the Robbery was committed, or whoſe Houſe broke open; Publiſhing a Libel is a Crime well known in our Law: Suppoſe it were only for Suſpicion of High Treaſon, he ſhall not be diſcharged, but ſhall anſwer it. In that Caſe of *Kendal* and *Roe*, he might be innocent of the Crime charged, yet they continued him on his Recogniſance, but did not diſcharge him. I do not know that ever there was any Time mentioned in any Warrant, ſo that Exception goes to all Warrants. Suppoſe the Warrant had been to commit him without Bail or Mainprize, if a Crime certain were charged, he ſhould not be diſcharged.

The Crime ſufficiently ſet forth.

Salk. 347. Skin. 596, 597.

Time for Examination never mentioned in Warrants

DE
Term. Sanct. Mich.
12 *Annæ Reginæ.*
In the KING'S BENCH.

Turnor verſus *Goodwin.*

THIS was an Action of Debt on Bond for 3000 *l.* for the Payment of 1500 *l.* The Condition of the Bond recites, that whereas *John Dibble* was indebted to the Plaintiff in a Bond for 3000 *l.* for Payment of 1500 *l.* and had recovered Judgment for this Money; the Defendant *Goodwin*, in Conſideration that the Plaintiff would forbear ſuing out Execution againſt *Dibble*, promiſed to pay the Money to the Plaintiff on Requeſt, he aſſigning the ſaid Judgment. The Defendant pleads, that the Plaintiff had not aſſigned the ſaid Judgment; the Plaintiff replies, he was ready to aſſign, and the Defendant demurs.

Condition of Bond to pay Money, the Plaintiff aſſigning a Judgment, which he had recovered; whether it was a Condition precedent?

Serjeant *Pratt pro Def':* The Queſtion is, whether the Plea be good? Whether it be a ſufficient Excuſe for Non-Payment, that is, whether the Aſſignment of the Judgment is to be precedent to the Payment of the Money?

Serj. *Pratt.*

This is a Condition precedent, and no other Conſtruction can make the Intention of the Parties effectual.

Would they have this Obligation to be a Covenant or Agreement to aſſign the Judgment? That cannot be, becauſe

here is no Remedy on this Obligation; as in *Pordage* and *Cole*, 1 *Sand.* 319. Agreement to give 500 *l.* for all his Lands; held, the Plaintiff need not aver a Conveyance, becauſe there are mutual Remedies.

Then as to its being a Condition ſubſequent, that could never be the Intent of the Parties; for then the Defendant is to pay the Money, and has no Remedy to compel the Aſſignment of the Judgment.

Caſes in Law and Equity 153.

2 *D'Anvers* 15. Here is no Inconvenience to either Party if it be conſtrued to be a Condition precedent, and will anſwer the Intent of both. If the Plaintiff firſt of all aſſign the Judgment, what Harm is there in that? As ſoon as he aſſigns, the Plaintiff is intitled to his Money immediately, and may bring his Action; and if the Party be living, may get Judgment, and then 'tis only changing Securities; the Words are proper to make a Condition. 1 *Jones* 189. 3 *Lev.* 132. Nay Words not ſo proper have been expounded a Condition. *Co. Litt.* 24. If the Intention of the Parties may be ſo conſtrued, *Cro. Car.* 433. 384. It muſt be ſuch a Conſtruction as the Party may have a proper Remedy. 5 *Co. Grey*'s Caſe. 1 *Vent.* 147. The Plaintiff is to do the firſt Act, he might have made an Aſſignment in the Abſence of the Defendant, and tendered it; and the Intereſt would have veſted tho' the Party not there; and could not be deveſted, but only by a ſubſequent Diſagreement. *Hob.* 69. and *Butler* and *Baker*'s Caſe.

But the Caſe of *Large* and *Cheſhire* in Point, *ipſo faciente bonum ſtatum*, held to be a Condition precedent. 1 Vent. 147.

Cheſhire, Serj. That the Acts ought to be concomitant.

Serjeant *Cheſhire*, *econtra:* Theſe ought to be concomitant Acts, and to be exchanged at the ſame Time. The Plaintiff could not aſſign without firſt reciting the Payment of the Money; the Plaintiff ſays, he was ready to aſſign, but the Defendant refuſed to pay: Requeſt and no Payment is a Refuſal to pay, and that diſcharges the Plaintiff from executing an Aſſignment; an Aſſignment without a Conſideration would be ineffectual, and it is a Difficulty upon the Plaintiff, and unreaſonable to part with a Security before the Money is paid. *Noy* 52. 34 *H.* 6. *Styles* 94. If you recite the Payment 'tis a Falſity, and if you do not

'tis ineffectual. 2 *H.* 7. *fo.* 8, 9. Caſe of *Large* and *Cheſhire*, there it is admitted he muſt do the firſt Act; and as to the Caſe of *Thorp* and *Thorp* the Releaſe muſt precede in the Nature of the Thing; it is reſolved into a Courſe of Dealing among the Parties. 4 *Leon* 91. *Trin.* 3 *W. & M. rot.* 466. *Bartlett* and *Wotton*, *R. B.* 3 *Lev.* 103. is a Caſe in Point. 1 Vent. 147. Salk. 171.

Pratt, Serjeant, in Reply: That Book of *Levinz* is expreſsly upon Payment, ſo then he muſt do the firſt Act where it is an expreſs Condition. If Judgment be firſt aſſigned, 'tis enough to recite the Condition of the Bond, and it would be a good Aſſignment without reciting the Money paid; for giving the Bond is Payment of the Money, it is giving one Security for another, and 'tis no Wonder that one Man's Bond is better than another's Judgment; the Moment the Plaintiff aſſigns, the Bond is forfeited; and if he had paid the Money, he could have no Remedy for aſſigning the Judgment. As to the Caſe of *H.* 7. there is no Reaſon any one ſhould releaſe another 'till Payment of the Money. *Pratt*, Serj.

Salkeld, Serjeant, at another Day *pro Def'*: Conditions are either precedent or ſubſequent, and Acts cannot be done *uno flatu* at the ſelf-ſame Time, but there muſt be ſome Precedency; and this is a Condition precedent. There are no ſet Forms of Words to make a Condition, it muſt be conſtrued ſo according to the Intent of the Parties, 3 *Cro.* 454. 2 *R. Rep.* 68. 1 *Inſt.* 204. *Pro* ſhall make a Condition, not from the Import of the Word ſo much as from the Intention of the Parties; as an Annuity granted *pro concilio impendendo*, if he refuſes to give Advice, the Annuity ceaſes; ſo of the Grant of being Keeper of a Park, with a Salary, if he neglect the Duty of his Office, he forfeits the Salary; for the Law made it conditional. 5 *Co.* 78. 14 *H.* 4. *p.* 19. *Bro. Cond.* 42. *Salkeld*, Serj. That this is a Condition precedent; no ſet Form of Words neceſſary.

Reeves econtra pro Quer': *Firſt*, Theſe Words do not import a Condition precedent in themſelves. 3 *Co.* 20, 21. 3 *Cro.* 204, 454. 2 *Jones* 205. *reparando.* 1 *Sid.* 280. *Reeves.* That the Words do not import a Condition in themſelves;

Secondly,

Nor is it ſo from the Nature of Contract.

Secondly, Nor is it a Condition precedent from the Nature of the Contract and Agreement; the Intent appears by the Recital, the primary Intent was to give a farther Day, and he was to have a farther Security, *i. e.* the Bond of the Defendant too; if the Defendant did pay, then he was to have the Security, in the uſual Method of Dealing, the Money is always paid before the Execution of the Conveyance, where Money borrowed. Is it reaſonable for the Plaintiff to make an Aſſignment when the Defendant has refuſed to pay the Money? 5 *Co.* 23. *b. Lamb*'s Caſe. 'Tis hard upon the Plaintiff, for if the Defendant keep out of the way but one Day, which is the 26th, he is ſafe, and gets rid of his Security; it is therefore neceſſary there ſhould be concurrent Acts both of the Plaintiff and Defendant. Making an Aſſignment behind the Back of the Defendant will not do, and if no Conſideration in the Aſſignment, it would be Maintenance. 3 *Cr.* 552. 3 *Leon.* 234. *Noy* 52. 3 *Cro.* 170. *Bro. Maintenance* 8. *Gray*'s Caſe in 5 *Co.* has been much inſiſted on, but that is not to this Purpoſe, but only proves if the Cuſtom had been to have Common, paying ſo much, that thoſe Words paying would be Part of the Cuſtom, becauſe it made the Cuſtom conditional, which before was abſolute, but ſays nothing of the Priority of the Performance. And *Hob.* 69, 77. only ſhews what would be a good Performance, and is a ſtrong Argument that the Aſſignment cannot be made behind their Backs. This differs from the Caſe of 14 *H.* 4. *p.* 19. for here the Aſſignment of the Judgment is not the Conſideration of Payment of Money, but ſtaying for the Money was the Conſideration: Where two Acts are to be done, and to one there is a Time prefixed, but not to the other, that which has a Time prefixed muſt be done firſt. As to the Caſe of *Large* and *Cheſhire*, 1 *Vent.* there was a Time limited for making the Eſtate, but none for Payment of the Money. So the Caſe of *Pordage* and *Cole*, mentioned in *Thorp* and *Thorp*, there was no Day limited, and here are mutual Remedies in this Caſe. 1 *Cro.* 384. *Peters* and *Opie*, 1 *Lutw.* 565. 4 *Leon.* 91. *Cole* and *Watſon*, 3 *Lev.* 103.

That concurrent Acts are neceſſary.

When two Acts are to be done, which to be firſt.

1 Lev. 274.

Chief Juſtice *Parker:* The Queſtion is, whether the Plaintiff's Aſſignment be the firſt Act to be done, or not. This differs from the other Caſes, where the Time and the Conſideration are mentioned. Here are no Words that expreſsly ſhew the Priority of the Act. The Defendant would have Aſſigning to be *firſt aſſigning*, and the Plaintiff would have it *aſſigning thereupon*, that is, after Payment. *Parker*, Ch. J. gives the Reſolution of the Court.

This is ſupplying Words ſuppoſed to be underſtood, for here are no expreſs Words.

The Difficulty lies here; if the Plaintiff is to do the firſt Act, then Aſſigning implies a Deed, he muſt not only ſeal it but deliver it too. *Fitz-Herb. Action* 79. 3 *Cro.* 143. *Noy* 18. *Hob.* 69. And if he muſt deliver it, he muſt find the Defendant out; ſo 'tis not in his own Power to make it have a certain Effect: On the other ſide, if the Defendant muſt do the firſt Act, after he has paid the Money, he has no Remedy to get an Aſſignment. The Difficulty on each ſide.

Therefore, we are all of Opinion, that there is one Way that will ſolve all theſe Difficulties, and that is, that this Aſſignment ſhall neither precede nor wait, but ſhall accompany the Payment, and both to be done at the ſame Time. The Aſſignment and Payment to be concomitant.

The Defendant ought to find out the Plaintiff, to tender him the Money, and at the ſame Time to demand an Aſſignment; and then if the Plaintiff refuſe, the Defendant will be excuſed. He is not to tender the Money abſolutely, becauſe he is not bound to pay it abſolutely, but he is to tender it *ſub modo*, on the ſame Terms he is to pay it. The Defendant to tender Payment *ſub modo*, and demand Aſſignment.

The Defendant may inſiſt, that till the Aſſignment is made, the Money is his; ſo the Plea is defective. Thus he has the Remedy in his own Hand, and the Money is here his Security till the Aſſignment; tho' the Money Plaintiff cannot take the Money until Aſſignment.

be told over by the Defendant and Plaintiff, yet it remains ſtill the Defendant's Money, and the Plaintiff cannot juſtify the taking it tho' laid on the Table.

And then the Property of it will alter.

On the other hand, the Moment he has delivered the Aſſignment, the Property of the Money is altered. If a Tender be to *J. S.* in full of all Demands, it will be ſo tho' he take it in Part. 'Tis like buying of Goods, this Money is yours if you deliver to me this Watch; the Money is his if he deliver the Watch, if not 'tis otherwiſe. Debt on a ſingle Bond before the late Statute, Payment is not compellable till Acquittance; in ſuch an Action, the Plea is good to ſay *he was always ready if he had an Acquittance. Fitz-Herb. Ab. tit. Verdict* 33. the Defendant is not bound to pay till Acquittance, nor the Plaintiff to make Acquittance till Payment, the Acquittance is Part of the Terms on which Money is to be paid. 2 *H.* 7. *fo.* 8, 9. is what I rely upon, the Acquittance muſt be before the Completion of the Payment; ſo an Officer in the Exchequer ſhall not deliver a Tally before Payment, and yet he cannot pay till he have the Tally. *Fitz-Herb. Exchequer* 4. N° 7. and *vide Brook's Abr.* The Word *recipiens* in that Caſe is as ſtrong as the Word *aſſigning* here; this Aſſignment is an Acquittance whenever the Defendant pleaſes, 'tis for the Defendant's Benefit that 'tis not abſolute; it is Payment *eo inſtante* the Acquittance is made and tendered. Nothing makes a Bond void but Payment, ſo that not having an Aquittance is only an Excuſe; and he that pleads an Excuſe muſt ſhew he did all that he could poſſibly. The Obligor is to tender, and the Obligee to receive, and if he refuſes he ſhall not take Advantage, and ſay the Bond is void, yet the Defendant muſt plead the Excuſe, and the Obligor here is to complete the Payment by aſſigning and receiving.

Nature of Tenders.

Acquittance and Payment where concomitant.

Nothing makes a Bond void but Payment.

Tender and Refuſal how to be pleaded.

He that pleads a Tender and Refuſal, that is not enough, unleſs he plead that he was always ready; for this is only an Excuſe for Non-Payment. The Payment required in this Caſe is a ſpecial Payment upon

on Terms, and not a general one; and being obliged to make a ſpecial Tender, there muſt be a ſpecial Refuſal, and it muſt be pleaded in the ſame Manner as a general Tender; and this is the beſt Account of the Caſe in 3 *Lev.* *Cole* and *Walton*, and the Record is different from the Book. This is a Payment in lieu of the Bond; if the Aſſignment muſt be firſt, the Money may never become payable. The only Caſe near this is *Large* and *Cheſhire*, 1 *Vent.* 147. But no Judgment entered, nor Rule for that Purpoſe.

He muſt plead he has done all of his Part poſſible, but here he has done nothing at all.

Here is no Inconvenience, 'tis in Aſſiſtance of Juſtice, therefore we are all of Opinion that the Plaintiff ſhould have Judgment. Judgment for the Plaintiff.

DE
Term. Sanct. Hill.
11 *Gulielmi* III.
In the KING'S BENCH.

Aſhmead and *Ranger*.

Whether a Lord of a Manor can enter upon his Copyholder in Fee and cut down Timber, not leaving ſufficient Eſtovers? Salk. 638. S. C.

THIS was an Action of Treſpaſs brought by a Copyholder in Fee againſt the Lord of the Copyhold, for entering his Copyhold, and cutting down Timber, tho' it was the Lord's own Timber, and no Cuſtom for the Tenant to cut down any Timber.

Northey. *Northey* for the Defendant: If the Tenant cannot cut down Timber, nor the Lord enter to cut down the Timber, it muſt rot, for it cannot be cut down by any other. There have been many learned Men of Opinion, that the Lord might cut down Timber, and might enter for ſo doing, in Caſe of a Copyholder in Fee, elſe the Timber muſt for ever be uſeleſs.

Holt, Ch. J. *Holt*, Chief Juſtice: The Lord of a Manor cannot enter on his Tenant, tho' a Copyholder for Life only, and cut down Timber without the Tenant's Conſent; becauſe he has a ſpecial Property in the Trees as well as in the Land, he is as much a Copyholder of the Trees, as he is a Copyholder of the Land.

At another Day, *Paſch.* 11 *W.* 3.

Northey for the Defendant: The Queſtion is, whether the Lord of a Manor of common Right cannot enter and cut down Timber off his own Copyhold Eſtates, otherwiſe the Timber muſt rot; for the Timber is the Lord's, and the Tenant cannot cut down any: Beſides, the Action ſhould not be Treſpaſs, but an Action of the Caſe. *Godbolt* 273. *Moor* 727. 1 *R.* 196. 3 *Cro.* 629. *Northey.*

Earl for the Plaintiff: A Copyholder, tho' he is Tenant at Will only, yet is not barely ſo, for the Lord cannot determine the Tenant's Eſtate at his Pleaſure; for if it were ſo, the Lord's Entry to cut down a Tree would be a Determination of the Eſtate; and ſo would the Death of the Lord be a Determination of the Tenant's Eſtate. And ſurely a Copyholder in Fee or for Life, may maintain an Action of Treſpaſs againſt the Lord or any other Perſon. 2 *H.* 4. 12. Our Preſcription is to cut down Timber for repairing the Houſes of the Copyholders, and we ſay we cut down no more than what was ſufficient for that Purpoſe; and a Cuſtom for a Copyholder in Fee to cut down Timber, and to ſell it has been held to be a good Cuſtom. 1 *R.* 508. 1 *Sid.* 152. And Copyholder may open a Mine; perhaps *aliter* of Copyholder for Life. *Earl.*

Holt, Chief Juſtice: Tenant at Sufferance cannot bring Treſpaſs againſt him that has the Right, tho' againſt a Stranger he may. 2 *Sand.* 422. *Noy* 14. 13 *Co.* 67. 2 *Brownlow*, *Yelv.* 104. *Holt.*

Northey for the Defendant: The Timber is the Lord's, and the Tenant has no Manner of Right to it; as to opening a Mine, a Tenant for Life of a Copyhold cannot do it, tho' perhaps he may dig if it be open. Copyholder in Fee has no more Privilege than Copyholder for Life without a Cuſtom, and the Right to the Timber is the Lord's, but he has no Right if he has no Remedy, *i. e.* if he can maintain no Action of Treſpaſs, for otherwiſe he can never come at his Right; *Northey.*

and the Lord of the Manor can cut down Timber without any Cuſtom.

Holt, Ch. J. for the Plaintiff. Chief Juſtice *Holt:* That Caſe of *Rutland* was only in the Caſe of a Parſon, and they held that no Body elſe might. My Lord *Coke* ſays expreſsly, and is of Opinion, that if the Lord cut down all the Trees ſo as not to leave enough for Eſtovers, the Tenant may have an Action of Treſpaſs: Is not the Tenant as much a Copyholder of the Trees as he is of the Land, for the Trees are not excepted? 3 *Cro.* 361. Who ſhall have the Acorns of Oaks? ſhall not the Tenant have them? he is to have all the Profits; 'tis urged that a Copyholder cannot take Wood for Bote, but that is not ſo: Suppoſe a Bird builds a Neſt in a Tree, ſhall not the Copyholder have it? yes he ſhall.

Gold, J. for the Plaintiff. Juſtice *Gold:* If I have Eſtovers in another's Land, and he cut down all the Wood, I ſhall have an Action of the Caſe; but if I have the Wood, and another the Land, then Treſpaſs will lie; as this Caſe is, and as the Pleadings are, the Tenant has loſt all his Trees; for tis pleaded that there are not Trees enough left to have ſufficient for Repairs and Houſe-bote.

Holt, Ch. J. Chief Juſtice *Holt:* The Tenant may maintain an Action of Treſpaſs againſt the Lord by reaſon of his Poſſeſſion, and the Tenant has no Liberty to cut Timber but for Eſtovers; and if the Lord cut ſo much as not to leave ſufficient for Eſtovers, there he ſhall recover Damages for all the Trees in Treſpaſs; but if he have enough left he ſhall recover according to his poſſeſſory Intereſt; but this is a Caſe where ſufficient Eſtovers were not left.

Judgment for the Plaintiff. As to the Queſtion, whether the Lord can cut down Trees, tho' he do leave ſufficient for Eſtovers? when that is the Caſe, I ſhall give my Opinion; but in this Caſe the Plaintiff muſt have his Judgment; for here it appears there were not ſufficient Eſtovers left.

DE
Term. Paſch.
11 *Annæ Reginæ.*
In the KING'S BENCH.

Pern and *Manners.*

When and how Conuſance by the Univerſity of *Cambridge* is to be claim'd.

ACTION of Aſſault and Battery was brought againſt one of the Members of the Univerſity of *Cambridge*, and the Univerſity claimed Conuſance (but it was after an Imparlance) by Virtue of a Charter of Queen *Elizabeth*, whereby *Cognitio Placitorum*, with excluſive Words *non alibi*, was given to the Court of the Vice-Chancellor, to proceed *ſecundum Legem & Conſuetudinem Univerſitatis*; which Charter was confirmed by Act of Parliament, and this Conuſance was delivered in to the Attorney for the Plaintiff, and not into Court.

Whitaker, againſt the Conuſance.

Whitaker objected, That Conuſance ought to be demanded of the Court, and it ought to be done by Warrant of Attorney; and now it is demanded of the Court, it comes after an Imparlance, which is too late.

This Queſtion is not between Plaintiff and Defendant; the Defendant himſelf cannot demand Conuſance, it muſt be by the Vice-Chancellor of the Univerſity, their Bailiff or Attorney; Conuſance muſt be demanded in open Court,

Court, as ſeveral from the Iſle of *Ely* have been made; they now alſo come too late, it being not demanded till after the four Days for Pleading were out.

Lechmere, againſt the Conuſance, &c.

Lechmere: It is wrong in both Points; demanding Conuſance is the Act of a third Perſon, who is to interplead with the Court, and the Court can take no Notice of the Conuſance till it comes into Court; and it was not delivered to the Plaintiff's Attorney till the 5th Day in the Term, which is a Day too late, it ought to be delivered in four Days.

It is true what is ſaid in *Hardreſs*'s *Reports*, that Conuſance of Pleas is of three Sorts; the firſt is, *tenere Placita*, where Priority of Suit only gives one Court the Preference to the other: the ſecond is *Cognitio Placitorum*, and this muſt be limited as to Place; the third is *Cognitio Placitorum*, with excluſive Words *& non alibi*; the laſt is what is now in Queſtion; and that would be of no Force to determine Matters according to the Civil Law, without an Act of Parliament; and therefore there was one Act paſſed in Queen *Elizabeth*'s Reign, to confirm the Privileges of both Univerſities.

Attorney and *Solicitor*, for the Conuſance, &c.

Attorney and *Solicitor econtra* inſiſted, it was well in both Points, that the Plaintiff was concerned as well as the Court, and might plead to the Conuſance; for that the Court will not allow Conuſance, unleſs it were before allowed in *Eyre*, or unleſs the original Letters Patent were produced; for there may be a Counterplea to the Conuſance.

Parker, C. J. againſt the Conuſance as delivered.

Chief Juſtice *Parker:* The Queſtion is, whether this came into Court properly, and then whether it came in in proper Time; if it had been a Plea it ſhould have come in before five Days; four Days are allowed, and then underſtood to be done in Court formerly as all Pleading was at the Bar. Suppoſe in this Caſe the Party ſhould ſay at the Bar, we will deliver this Conuſance in Writing to the

Attorney, that would be odd; and why not then as well as now, for I take it that the ancient Courſe is not alter'd in this Caſe, and this Affair muſt be tranſacted in Court here, that the Court may ſee and take Care of their own Juriſdiction; can this now be put into the Office if the Attorney could not be found? The Court is to give Day over, and the only Queſtion is between this Court and the Court of the Vice-Chancellor, and it is an Application to us. If the Plaintiff's Attorney ſay nothing, he may confeſs; but ſurely he cannot confeſs this, for the Letters Patent muſt be produced for the Satisfaction of the Court, and the Attorney has no Right to ſee them or judge thereon. On the fifth Day you came into Court, and on that Day there was an Imparlance; he may reject the Imparlance the firſt four Days, but afterwards he has accepted and taken it; and whether this Conuſance comes in in Time or no, that is the Queſtion; and I think it came not in in Time.

Juſtice *Powis ad idem.*

Juſtice *Eyre ad idem:* Conuſance muſt be allowed or diſallow'd by the Court, the Attorney has nothing to do with it; it is not a Plea, becauſe Conuſance cannot be pleaded; an exempt Juriſdiction may be pleaded, but Conuſance cannot; the Conuſance muſt be delivered to the Court, and is a Queſtion between the two Courts, which this Court is to determine. *Eyre*, Juſtice.

Then as to the ſecond Point, you do not come to this Court to demand Conuſance till the 5th Day; and if ſo you do not do it till there is an Imparlance. So the Court delivered their Opinion, that this Delivery of the Conuſance to the Attorney was not good, and the Record of it irregularly filed, and that the Conuſance came not in in Time, being after Imparlance.

In *Paſch.* 13 *Annæ*, it was agreed by Chief Juſtice *Parker* and the whole Court, that the true way of claiming Co-

nuſance was by Letter of Attorney from the Univerſity to claim it, and bringing the Charter into Court and the Exemplification of the Statute of the 13th of *Elizabeth*, which confirms their Privileges to proceed according to the Civil Law; which the King by his Letters Patent could not do; and the Declaration was produced, and it appearing to be of the ſame Term, the Conuſance was allowed; for all the Clerks and Court agreed, that they might come any Time the ſame Term to claim Conuſance; and Chief Juſtice *Parker* adviſed for the future to get an Exemplification of the Record of this Allowance, ſo as not to be at the Charge of bringing up the Charter.

N. B. In *Paſch.* 12 *Annæ*, the Plaintiff moved the Court that the Defendant might pay Coſts for all the Motions about that Conuſance; but the Motion was denied, for they ſaw no Reaſon, nor did they ever hear of any Precedent.

DE
Term. Sanct. Trin.
7 & 8 *Georgii* II.
In the KING'S BENCH.

Mr. Pitt's Caſe.

Lord Hardwicke, *Chief Juſtice, delivering the Opinion of the Court.*

Concerning Privilege of the Parliament.

THERE are ſeveral Suits againſt Mr. *Pitt*, and a Rule was made for the Plaintiff to ſhew Cauſe why the Defendant ſhould not be diſcharged. The Caſe was thus: The laſt Parliament was prorogued on the 17th of *April* laſt, which determined the Seſſion of the Parliament; the Parliament was diſſolved on the 18th, which determined the Parliament itſelf. The Defendant was arreſted by a *Capias* out of the Common Pleas on the 20th; an *Habeas Corpus* was brought at the Suit of another Plaintiff, and on the *Habeas Corpus* on the 27th of *April*, the Defendant was committed to the Cuſtody of the Marſhal; and ſince he has been charged with ſeveral *Latitats*, and ſeveral Declarations have been delivered to him in Cuſtody at the Suit of other Perſons. Laſt Term a Motion was made that he might be diſcharged by reaſon of his Privilege of Parliament; for that he was arreſted within two Days after the Diſſolution, and three Days after the Prorogation of Parliament. And this Court had the Advice of all the Judges, becauſe ſuch an Attempt to have the Defendant diſcharged on Affidavits, appeared to be a new Thing; and three Queſtions aroſe.

Firſt,

Three Queſtions.

Firſt, Whether the Defendant was intitled to Privilege?

Secondly, Whether he was arreſted in Breach of that Privilege?

Thirdly, If he were, how he ſhould take Advantage of his Privilege, in order to have his Perſon diſcharged, whether by Writ of Privilege under the Great Seal only, or by Motion on Affidavits?

The Queſtions reſolved in the Affirmative.

As to the two firſt Queſtions, the Judges agreed in the Affirmative, becauſe two Days was not a reaſonable Time for the Defendant, *&c.* As to the third, all the Judges agreed, that a Writ of Privilege was the ancient Way; but there were different Opinions whether it could be done by Motion or not? We are informed that the Defendant hath applied to the Court of Chancery for a Writ of Privilege, and that ſince he has withdrawn that Application; and we have been moved, whether he can be diſcharged on Motion, without a Writ of Privilege, or not? On this all the Judges have met again, and all (except Lord Chief Baron who doubted, and Baron *Thomſon* who inclined to be of another Opinion) were of Opinion, that as the Law is at preſent, the Defendant may be diſcharged on Motion.

Two Points for the Reſolution of the 3d Queſtion.

There are two grand Points on which our Judgment is founded.

Firſt, On conſidering how the Law ſtood as to this Matter before 12 & 13 *W.* 3. *c.* 3. which was made to avoid the Inconveniencies ariſing from Privilege in Parliament.

Secondly, Whether the Statute hath made any Alteration of the Law in this Caſe?

Writ of Privilege the ancient Method.

As to the firſt, All the Judges were of Opinion, that before that Statute, the regular Way for a Perſon intitled to Privilege obtaining his Diſcharge from the Courts at *Weſtminſter*, was by Writ of Privilege under the Great Seal; for

we do not meddle with the Privilege of a Member while the Parliament ſits, becauſe that is a Matter for their Conſideration. This Writ of Privilege was a *Superſedeas* to the Suit and Action in ſtopping the Proceedings in the Cauſe, and the Concluſion always was *Si Quer' in placito procedere velit & debeat.* This will appear by looking into *Prynne*'s *Regiſter of Writs* 160. Thus it was at the Common Law.

The Queſtion then is, whether the Statute has altered the Law in this Matter as to the Diſcharge? And we are of Opinion that it has made two Alterations. The Statute has made two Alterations.

Firſt, That the ancient Plea of Privilege concluding that the Court ought not to proceed in the Action is taken away by this Act of Parliament.

Secondly, That it has made the Arreſt of the Perſon illegal and irregular.

The Effect of the Act of Parliament conſiſts in abridging the Privilege of Parliament. The Conſequence of which Act is, that it has made it legal to proceed againſt a Member of Parliament even during the Continuance of Privilege, and the Court hath Juriſdiction and Conuſance of the Cauſe, and may proceed in an Action commenced againſt one immediately after the Diſſolution or Prorogation of Parliament, and from and immediately after an Adjournment of both Houſes for above fourteen Days. The Effect of which is, that the Defendant cannot plead his Privilege to the Suit, becauſe the Court has Juriſdiction. Can he plead in Avoidance of the *Latitat* or *Capias?* That is not a Plea to the Suit, but the Proceſs only by which he is brought in, and it cannot be done without the expreſs Words of an Act of Parliament; and by the general Rule of Law it hath been determined that ſuch Plea is not good. In the Caſe of *Widdrington* verſus *Charlton*, *Hill.* 11 *Annæ*, where one was brought in by wrong Proceſs, or Proceſs miſawarded, it was reſolved he could not plead to the Proceſs, but only to the Action or Juriſdiction of the Court, or to the Original. If the Defendant in this Caſe has a Right to Privilege, and Caſes in Law and Equity 86.

by reaſon of the Alteration of the Law he cannot have the old Plea of Privilege as to the Juriſdiction of the Court; he muſt be able to do it by Motion, becauſe the Act has made the Execution of this Proceſs by Arreſt, irregular and illegal. This Act has done two Things: *Firſt*, It has introduced a new Way of Proceeding againſt thoſe that have a Right to Privilege of Parliament. *Secondly*, That no Plaintiff ſhall arreſt or impriſon the Body of any Knight, Citizen, or Burgeſs during the Continuance of the Privilege of Parliament. The Words in the Act are negative Words, and therefore the Courts of Law muſt take Notice of it as a general Law; and is not now under the Neceſſity it was formerly of having this certified to them as before. The Queſtion then is, if the Defendant is a Member of Parliament or not? and that is made out by the Return of the Writ in the Crown Office, and the Return of the Writ itſelf was produced to the Court on the Motion, and by the Record we think it ſufficiently appears to us that the Defendant was a Member of Parliament; but without the Record it would not. There are ſome Opinions that favour this; in Sir *Richard Temple*'s Caſe in *Sid.* the Court ſaid they could not take Notice that Sir *Richard* was a Burgeſs on the Footing of his Affidavits, and the ſame Caſe is reported three Times by *Keble* in his firſt Report (who, tho' he was a bad Reporter, was a good Regiſter.) 1 *Keb.* 3, 13, 16, 727.

1 Sid. 42, 192. 1 Keb. 3, 13, 16, 727.

Caſe of a Peereſs. Salk. 512.

In 1 *Vent.* Lady *Huntingdon*'s Caſe, ſhe was arreſted by a *Latitat*, being a Peereſs, and moved for a *Superſedeas*; and it appeared on the Proceſs that ſhe was a Peereſs. The Court diſcharged her altho' ſhe might have had a Writ of Privilege. Lord *Banbury*'s Caſe, *Salk.* he was arreſted by the Name of *Charles Knollys*, and moved for a *Superſedeas*, and it was ſaid, that if the *Latitat* had been ſued out againſt him by the Name of Lord *Banbury*, he ſhould have been diſcharged. So far the Law ſuppoſes a Peer able to anſwer the Demand of any perſonal Action, and if he had ſat in Parliament by Virtue of any Writ of Summons, and had been ſued as *Charles Knollys*; but not having ſat in Parliament, they could take no Notice of his Peerage, and would not proceed to try it by Motion. In that Caſe, the Letters

Patent of Creation were produced, but it being a Matter of Fact whether he was Heir at Law to the Anceſtor created, the Court would not try it on Motion. I have a Manuſcript Report of that Caſe, in which it was ſaid by *Holt*, that if he had been ſummoned to Parliament, and had a Writ of Summons, and there had been no Diſpute about the Identity of the Perſon, the Court would have diſcharged him on Motion. From whence it appears, that if it had appeared on the Record that he was a Peer, they would have diſcharged him on Motion. *Vide* Lord *Mordington*'s Caſe in Lord Chief Juſtice *King*'s Time in *C. B. poſtea* p. 165. Now it appearing to us from the Record that the Defendant was a Member of Parliament, 'tis like the Caſe of arreſting one not liable to be arreſted; 'tis like the Caſe of an Arreſt on a *Sunday* againſt the Statute, which ſays it ſhall be void, the Court in that Caſe would diſcharge the Perſon on Motion. So in the Caſe of Ambaſſadors Servants on 7 *Anne*, in which there is a Clauſe that the Proceſs ſhall be void if he be arreſted; the Conſtruction the Court puts on that, is not that he ſhall plead in Avoidance of the Proceſs, but in order to give the moſt Benefit on the Act, that he ſhall be diſcharged on Motion; and in all Caſes where the Court judges the Proceſs to be void in Law, they will diſcharge on Motion. In the Act againſt frivolous and vexatious Arreſts, it is ſaid that no Perſon ſhall be arreſted for a Debt under 10 *l.* and in ſuch Caſe the Court will diſcharge on Motion.

Of a *Scotch* Peer, *poſtea* p. 165.

Arreſt on *Sunday*.

Caſe of Ambaſſadors Servants.

Arreſt under 10 *l.*

As the Arreſt of the Defendant is irregular, the Perſon may be diſcharged, and it may be done by the Court either on Motion, or on a Writ of Privilege; and 'tis like the Caſe of a Juror or a Witneſs, or the Party whoſe Suit is depending, being arreſted going to Court, or coming from the Court, in which, *&c.* the Privilege on which they ſhall be diſcharged is the Privilege of the Court on which they were attending; and antiently Writs of Privilege uſed to be brought on ſuch Occaſions: And in *Raſtall* there are many ſuch Writs, and tho' a Writ of Privilege may be had in thoſe Caſes, yet the Court will diſcharge on Motion; and that is done not only

Arreſt of the Defendant irregular.

Juror, Witneſs, Party,

diſcharged on Motion.

only by the Court on which the Party, Juror, or Witneſs was attending, but alſo by the Court out of which the Proceſs iſſues; that is, by one Court's taking Notice of the Privilege of another; and that is like the Caſe of *Hatch* verſus *Bliſſet*, 13 *Annæ*, which is, A Witneſs was arreſted returning from the Aſſizes at *Wincheſter*, to the Place where he lived, in the Afternoon of the Day after he had been a Witneſs; he was not diſcharged by the Judge of Aſſize, but next Term a Motion was made in this Court out of which the Proceſs iſſued, to diſcharge his Perſon, becauſe he had been arreſted in Breach of the Privilege to which he was intitled in the Court of *Niſi Prius*; and this Court taking Notice of the Privilege of the Court of *Niſi Prius*, diſcharged him on Motion, altho' the Matter was not certified to this Court.

Waiver, how to be?

As to the Waiver of Privilege, that cannot be done with reſpect to his Perſon, but it may with reſpect to his being ſued; but that not without Writing under his Hand.

Rule to diſcharge the Perſon.

The Rule was, that the Defendant be diſcharged on filing common Bail, it being intended to be a Diſcharge to his Perſon, but not a Diſcharge to the Suit.

Lord *Mordington*'s Caſe.

In the COMMON PLEAS.

THE Lord *Mordington*, who was a *Scotch* Peer, but not one of thoſe who ſat in Parliament, being arreſted, moved the Court of Common Pleas to be diſcharged, as being intitled by the Act of Union to all the Privileges of a Peer of *Great Britain*, except a Seat in Parliament; and prayed an Attachment againſt the Bailiff; upon which a Rule was made to ſhew Cauſe. Concerning Privilege of Parliament.

And thereupon the Bailiff made an Affidavit, that when he arreſted the ſaid Lord, he was ſo mean in his Apparel, as having a worn-out Suit of Cloaths, and a dirty Shirt on, and but Sixpence in his Pocket, he could not ſuppoſe him to be a Peer of *Great Britain*; and therefore through Inadvertency arreſted him.

The Court diſcharged the Lord, and made the Bailiff aſk Pardon.

DE
Term. Paſch.

12 *Annæ Reginæ.*

In the KING'S BENCH.

The Queen verſus *Fellows, Dr. of Phyſick.*

The Judgment againſt a Phyſician for abuſing and cheating a Patient pretending him to be mad.

I Moved for Judgment againſt the Defendant, to have corporal Puniſhment, becauſe he was worth nothing. It was a Conviction on an Information in *K. B.* for aſſaulting and beating one *Alderman*, pretending he was Lunatick, and for impriſoning him as a Madman, *quouſque* he procured him to ſign and execute a Letter of Attorney directed to his Wife, by colour of which he had received and diſpoſed of to the Value of 1000*l.* but it did not ſet out that it was diſpoſed of to his own Uſe.

Mr. *Dee* for the Defendant.

Mr. *Dee* objected in Mitigation of the Fine, but ſaid he did not move in Arreſt of Judgment; that the Form of the Indictment was not right; for that *Litera Attorn'* was not proper, and that *Litera* did not ſignify a Writing.

Second Objection: That 'tis not ſaid he diſpoſed of this Money to his own Uſe, for he might diſpoſe of it for the Uſe of the Proſecutor in Payment of his Debts.

Litera Attornat. a Word of Art.

Cur' held it well enough, *Litera Attorn'* is a Word of Art, and well known in the Law; and 'tis ſaid it was ſigned

and dated ſuch a Day; and it is intended neceſſarily the Money was diſpoſed to his own Uſe when received in this Manner; for this is a Fraud mixed with great Violence.

At another Day, the Defendant had Judgment given againſt him, it appearing by the Evidence, that by this Cheat and Violence he had procured to himſelf about 1000 *l.* that he had debauched his Wife, that pretending to cure him of Lunacy, he beat him, hand-cuff'd him, gave him ſeveral ſtrong Purges in the Night, and carried him at one or two o' Clock in the Morning bare-headed when it rained.

The Judgment was,

To ſtand in the Pillory, to be ſent to the Houſe of Correction in *Southwark*, and to be whipped naked, and to be kept at Work there for the Space of a Year, to be fined 600 *l.* and to find Sureties for his Behaviour during Life.

DE
Term. Sanct. Trin.
9 & 10 *Georgii* II.
In the KING'S BENCH.

Stoughton verſus *Reynolds.*

Whether the Parſon, &c. can adjourn the Veſtry by his own Authority.

THE Declaration ſets forth, that the Plaintiff being an Inhabitant of the Pariſh of *All Souls* in *Northampton*, was choſen Churchwarden and offered himſelf to Dr. *Reynolds*, Chancellor of the Dioceſe, to be admitted into that Office; upon his being refuſed, he moved for a *Mandamus* to the Doctor, who returned that the Plaintiff was not choſen Churchwarden but another Perſon was. This was an Action for a falſe Return, and a ſpecial Verdict was found, *viz.* That in the Pariſh of *All Souls*, the Vicar has immemorially had the Nomination of one of the Churchwardens; that the Time appointed for chuſing Churchwardens, was on ſuch a Day in *Eaſter* Week 1734, when the Vicar nominated Mr. *Lowlk*, and the Pariſhioners the Plaintiff; and that in *Eaſter* Week following in the Year 1735. the Vicar choſe the ſame Perſon; and upon a Diſpute ariſing in the Aſſembly, whether the Pariſhioners could chuſe the Plaintiff *Stoughton* a ſecond Time, the Vicar adjourned the Aſſembly till next Morning, but that Part of the Pariſh who were for the Plaintiff, ſtaying behind, elected him; and the other Part aſſembling on the Morrow, elected another Perſon.

The ſpecial Verdict.

Abney: The Queſtion is, in whom the Right of Adjournment is? It is now held in many Caſes, and has been determined, that the eighth Canon of 1603, is contrary to Law, and has never been received as Law. *Cro. Jac.* 532. *Hard.* 378. *Carthew* 118. as it is a Cuſtom againſt common Right, ſo it is againſt Common Law; and on that Conſideration ought to receive a ſtrict and rigid Conſtruction; that the Office of Church-warden is a miniſterial Office, and a temporal Matter, in which the Eccleſiaſtical Court has no Right to interfere; for a Perſon that has no Right to chuſe or to be choſen, may be preſented, and that Right ſhall not be tried by them.

Abney, for the Plaintiff.

The eighth Canon of 1603. contrary to Law.

Bootle contra: There are more Queſtions ariſe in this Caſe than that of the Right of Adjournment only; as firſt, if this amounts to any Adjournment at all, legal or not legal, whether the Plaintiff has a Right of Action? for if it was an Adjournment then the Plaintiff was not elected. And if it was not, then the Election on the Morrow was void, and conſequently the Plaintiff continues ſtill in his Office, according to the Cuſtom, which is ſet forth, that he muſt continue in his Office till another is choſen. It is likewiſe found, that the Curate ſate in the Chair; and in all Aſſemblies, as at the Seſſions, he that ſits in the Chair, preſides of courſe, and conſequently has the Right of Adjournment; becauſe, if he who preſides hath it not, the Pariſhioners cannot have it, for that will introduce the utmoſt Confuſion, and the Aſſembly can never be adjourned but by a new Poll, and the Trouble of putting the Queſtion of Adjournment will amount to as much as that of determining who ſhall be Church-warden. It is well known the Mayor is the Perſon that in all corporate Aſſemblies preſides and has the Right of Adjournment in him; the Vicar has as much Right of being there as any Perſon at all, and it muſt either be in him or in no one. That if it ſhould be admitted that the Plaintiff was well and duly elected, there would have been no need of a *Mandamus*, for he continued in the ſame Office like the Mayor of a Corporation till another be choſen. 26 *H.* 5. 8. *fol.* 35. *pl.* 25. *Vent.* 267.

Bootle contra.

Dilemma for the Defendant.

That ſitting in the Chair proves Preſidence, and that infers a Right of Adjournment.

Inſtance of Mayors in Corporations.

If the Plaintiff well elected, no need of a *Mandamus*.

Cro. Cha. 670. that the King has no Right to controul a Cuſtom.

What is a proper Foundation for an Action for Damages in Caſe of an Office.

This being an Action to recover Damages, it muſt ariſe either from his being put out of his Office, or from having loſt the Privileges of it; but he was neither kept out of his Office if the Adjournment be bad, nor out of the Privileges, for he always continued in it; moreover, the Office is not an Office of Profit as was alledged 3 *Lev.* 362. and no Coſt or Expence is laid for the purchaſing the *Mandamus.* It is a Rule, that no one can maintain an Action for Damages without a reaſonable Cauſe of Expence. *Hob.* 267. An Action for labouring Jurymen, and the Queſtion there was, whether it could be proved the Party had ſuſtained any Damages by it. Yet the Act was held to be both a very wrong Act, and an Act againſt Law: But the Queſtion went off, and the Court after three ſeveral Arguments, laid hold of ſome other Words, and gave Damages upon them.

Reply for the Plaintiff.

Difference between Mayor and Vicar.

Abney for the Plaintiff: Tho' the Mayor preſides in the Chair, yet the Adjournment is looked upon as the Act of the Court; and the Mayor is the moſt eſſential Part of thoſe Aſſemblies corporate; which differs widely from the Caſe of the Vicar, who can at moſt be looked upon only as a Pariſhioner. The giving ſuch a Power of Adjournment at thoſe Aſſemblies, would be ſetting them at the Head of every Pariſh in the Kingdom; and *Holt,* Chief Juſtice held, that of common Right, the chuſing Church-wardens belonged to the Pariſhioners, tho' the Incumbent had got the Power of electing one Church-warden by Cuſtom; of this Opinion likewiſe was Lord *Hale,* 1 *Mod.* 144. 2 *Mod.* 236.

Election of Church-wardens of common Right.

Ld. *Hardwicke,* Ch. J. That the Right of Adjournment is in the Aſſembly.

Lord *Hardwicke,* Chief Juſtice: The whole of this Caſe will turn upon the Adjournment. At the Trial no Precedent could be found to ſatisfy me; and I do not believe any can be found. It is of great Conſequence; but nothing that has been ſaid at the Bar has ſatisfied me that

this is a good Adjournment, or that it can in Law be valid. It muſt be either upon Cuſtom or by the Common Law: But the Cuſtom is not ſet forth, and I do not find any ſuch Opinion to veſt a Power in the Parſon. It may have been a common Opinion, but that is not a ſufficient Ground for me, and that might have aroſe from ſelect Veſtries, or from a particular Cuſtom. If therefore it is not in the Vicar, it is ſaid it muſt be in the Church-wardens, but I cannot find it is; and I do not think it can be ſaid to be in any one of them. In whom then can it be, but in the Aſſembly itſelf? and the Right muſt be in the Body. The Inconveniencies Mr. *Bootle* mentioned will ariſe, but it is not in our Power to help that, and it cannot be taken otherwiſe.

Inſtance of the County Court.

At the Common Law anciently, the Sheriff could not adjourn the County Court; for the Suitors, not he, were Judges of it, tho' now the Law has put that Power in him. But in this Caſe, the Law has not placed it in any one; wherefore we have not the Power to take it from thoſe who have it to place it in thoſe who have it not. And even ſuppoſing the Vicar had a Power of preſiding, it does not follow that he has a Power of adjourning.

Power of preſiding does not infer a Power of adjourning.

As to the Objection, that the Plaintiff was obliged to continue in the Office till a new Election was made, and that he was not prejudiced by the Denial of Admiſſion, nor kept out of his Office, according to the Cuſtom; he was not in at that Time. And tho' *Eaſter* being a moveable Feaſt, he muſt continue in of conſequence till the Time of Election came; yet as he was well elected and refuſed to be admitted, he had a Right to ſue for a *Mandamus*, and to bring his Action upon the falſe Return; and was by no means obliged to go upon his former Election, no more than Mayors were, who before the Act of Parliament muſt have been elected for twenty Years together. Therefore I think the Adjournment is void, and Judgment muſt be for the Plaintiff.

Concludes for the Plaintiff.

Juſtice

Page, Juſtice, for the Plaintiff.

Juſtice *Page:* Lord *Holt* was of Opinion, that tho' the Mayor left the Aſſembly, yet the Burgeſſes muſt proceed. The Inconvenience that was mentioned is the ſame in the Quarter-Seſſions, where the Queſtion is very often put late at Night. This is an Injury done to the Plaintiff, and was forcing and keeping him out of a Place of Truſt and Confidence committed and delegated to him by the Pariſh, and is ſufficient to maintain an Action for Damages, being in my Opinion intirely elected to be new ſworn in.

Inſtance of Quarter-Seſſions.

Lee, Juſtice, for the Plaintiff.

Juſtice *Lee:* The Parſon perhaps has a Right of ſitting from his Freehold in the Church. But I do not think that can any ways give him a greater Right or Authority than any of the other Members of the Aſſembly; and it is a Rule in Law, that the major Part in all Elections have the Right of determining for themſelves. *Hackwell's Modus tenend' Parliament'* 93. *Redd* verſus *Matture.*

Judgment for the Plaintiff.

Judgment for the Plaintiff.

DE
Term. Sanct. Mich.

7 *Annæ Reginæ.*

In the KING'S BENCH.

Queen verſus *Leighton.*

This Caſe was heard *Paſch.* 4 *Annæ*, Salk. Rep. 106, 353, 450.

(Reſolution of the Court.)

JUſtice *Powis:* This is a good Conviction; it was a Conviction for a forcible Detainer upon View; made by Sir *Owen Buckingham*, Lord Mayor of *London*.

Powis J. Conviction for a forcible Detainer.

The 1*ſt* Point is, Whether the Entry was peaceable or not? and it does not appear what the Entry was, whether peaceable or by Force? this reſts on the Statute 8 *H.* 6. now it ſhall be intended an Entry that is peaceable, for the Law will never intend a Tort or Wrong. 2 *R.* 80. 2 *Cro.* 151. *Yelv.* 32, 99. 3 *Cro.* 915. The great Caſe that rules this Point, is, *Palmer* 194, 195. and whether the Entry be peaceable or forcible, yet the Detainer by Force is puniſhable.

Forcible Detainer puniſhable, tho' the Entry was peaceable.

The 2*d* Point is, If the Juſtice of Peace may fine; I think he may; they ſometimes do otherwiſe, that is, they commit *quouſque* he make Fine; the Juſtice ſees the Offence himſelf and the Manner of it, and therefore he is the beſt Judge of the Puniſhment himſelf, and he makes it a Record.

The Juſtice may fine.

He is intruſted to convict in a ſummary Way, and he that can convict, in the Nature of the Thing, may ſet a Fine.

Whether Formality neceſſary?

The 3*d* Point is, Here is a Judgment, and it is not ſaid, *Ideo conſiderat' eſt*, which is the legal Judgment; I think it is good notwithſtanding that, being a Proceeding in a ſummary Way; it is not a formal Judgment, and for that Reaſon it has been made a Queſtion, if a Writ of Error lay, or not, of ſuch a Judgment? but I think a *Certiorari* is the moſt proper Way to have this Conviction examined. 1 *R.* 743. *Raym.* 433. 1 *Vent.* 33.

Powell, J.

Juſtice *Powell:* The 1*ſt* Objection is, It does not appear what the Entry was, either peaceable or by Force; this might be a good Exception in an Indictment, but it cannot appear in a Conviction on View; the Entry may be peaceable and yet the Detainer may be by Force; ſo it muſt be ſet out in an Indictment, but it cannot be done in a Conviction on View, becauſe it cannot be known by View, nor can any thing be returned but what is in View.

Forcible Detainer only appears on View.

Rule where Matter founded on an Act of Parliament.

Where a Juriſdiction is founded on an Act of Parliament, you muſt be particular in it and follow the Words of the Act of Parliament. The Entry tho' it do not appear in the Conviction, yet it appears in the Complaint; the Complaint is a neceſſary Part in a Conviction, but not in an Indictment, becauſe made ſo by the Statute; and in an Indictment all the Matter comes into Queſtion, and the Party may traverſe it, but a Conviction on View cannot be traverſed. They may juſtify a Detainer by Force in ſome Caſes, as to defend their Poſſeſſion from wrong Doers, The 21 *Jac.* 1. has not altered the Indictment, but only extended it to Expulſion. Tenants at Will and at Sufferance are not within that Act. The Entry what it was muſt appear in the Complaint.

Difference between Conviction and Indictment.

It cannot appear on View what Eſtate he had.

Secondly, So alſo what Eſtate he had, tho' it do not appear, is no Exception, becauſe it cannot on View appear, but in the Complaint it appears he had a Fee-ſimple.

3*d* Exception, Not ſaid *adtunc exiſten' liberum tenementum*; this is anſwered in the ſame Manner; in a Conviction

'tis *aliter*, becauſe it has a Relation to the Complaint. *Vent.* 23. *Lamb.* 149. but it is reaſonable it ſhould appear ſomewhere what Eſtate he had.

2*d* great Point, whether they can fine? the Words of the Act are *ſhall make Fine.* It does not follow that becauſe they can convict, that therefore they may fine, for the Sheriff may convict but he cannot fine; but the Precedents run all this Way, and when they impriſon it muſt be done immediately. *King* verſus *Sutton*, there a Conviction was quaſhed becauſe the Juſtices had not ſet the Fine; but that goes a little too far. *Style* 650. The Juſtice may fine.

3*d* great Point: The general Way is by *Certiorari*, and not Writ of Error, becauſe it is a Judgment not in a ſolemn Manner, but in a ſummary Way; ſome Judgments on Convictions have been, *Ideo conſiderat'*. Now in ſuch Caſe the Queſtion is, whether a Writ of Error be not proper; in ſummary Proceedings, where the Judgment is not ſolemn, *Ideo conſiderat'*, I ſhould think no Writ of Error lies. A *Certiorari* lies.

Chief Juſtice *Holt* of the ſame Opinion: As to the firſt Point, it appears the Entry is to be *with Force.* In the Complaint, it ſays, that they entered with Force; and this is by Virtue of the Statute of 15 *Ric.* 2. they are to be convicted on View, where the Entry is by Force, therefore the Entry by Force ought to appear; the Entry indeed is out of the View of the Juſtice, and he cannot know that; but by the Complaint he may, and if there be no forcible Entry, the Juſtice has no Juriſdiction; for the Words of the Act are on ſuch Force. Then comes the Statute 8 *H.* 6. but that makes no Alteration where peaceable Entry and a forcible Detainer, but gives them Power to make Reſtitution, but not to convict them on View. So the Statute of *H.* 8. enacts that the Statute *Ric.* 2. be obſerved, nor does that Statute give any Conviction on View for forcible Detainer. The Caſe of an Indictment is different, there it muſt ſhew what the Entry was, either peaceable or forcible; tho' there was no Remedy given when the Entry was peaceable till the Statute *H.* 6. whether one or other, peaceable or forcible; if the *Holt*, Ch. J. That it ought to appear the Entry was with Force. St. 15 *R.* 2. St. 8 *H.* 6. St. *H.* 8.

Forcible Detainer puniſhable by Indictment.

the Detainer be by Force, it is puniſhable, and either Way he is guilty. *Palmer* 194. is a full Authority. It did not appear he had diſſeiſed him; now there muſt be a Diſſeiſin, and that is the true Reaſon why the Entry ſhould appear. *Latch* 234. For if you ſhew an Entry and Diſſeiſin or Expulſion, and that there was a Detainer by Force, that is good without ſhewing whether the Entry was peaceable or *aliter*; it ſhall be intended to be peaceable if no Force do appear; but on the Statute of *Ric.* 2. 'tis *aliter*; the Juſtice is bound on Complaint to go and view the Premiſſes.

Rule as to admitting the Juriſdiction of inferior Court.

In an inferior Borough Court where the Matter is laid to be within their Juriſdiction, if the Defendant do not deny it, it is admitted, and if they do deny it, they may try it; and he ſhall never aſſign that for Error becauſe he has admitted the Juriſdiction in not denying it. He may remove this by *Certiorari*, and plead here that he and his Anceſtors have had three Years quiet Poſſeſſion.

As to Fining.

As to the Fining, Juſtices may fine, but the Queſtion is in what Way? whether *Ideo finis ei imponitur* will do; the Intent of the Statute is, that the Juſtice ſhould give Judgment; the Words are, *they ſhall commit until they make Fine*, *i. e.* he is to be committed till he think ſeriouſly what to fine him, it requires ſome Conſideration. In the Acts concerning Deer-ſtealing, the Juſtices are only to convict, and the Act orders a Diſtribution, but here the ſetting of a Fine is an Act of Judgment; he ſhould ſay *Ideo conſiderat' eſt*, and the Precedents I think warrant it, but I have not fully conſidered this Matter, and am doubtful: They may have a *Certiorari* here before Judgment.

The Chief Juſtice doubted.

Powell, J. That Error does not lie.

Juſtice *Powell:* In Orders the Juſtices are Judges, but a Writ of Error will not lie, becauſe there is no formal Judgment; if they don't impriſon preſently, 'tis falſe Impriſonment.

The Conviction affirmed.

So the Conviction was affirmed, but *Cur' adviſ'* as to the Writ of Error lying, and as to the *finis ei impoſit'*; and Juſtice *Gold* was of the ſame Opinion, that it was a good Conviction.

9 *Annæ Reginæ.*

In the KING'S BENCH.

Williams verſus *Gun.*

" *Middl' ſſ.* JOhannes Williams, Adminiſtrator omnium " & ſingulorum Bonorum, Jurium & Cre- " ditorum, quæ fuerunt Barnabæ Moye " Tempore Mortis ſuæ, qui obiit inteſtat', queritur de Wil- " lielmo Gun alias Gunn in Cuſtodia Mar' Mareſc' Domi- " næ Reginæ, coram ipſa Regina exiſten', pro eo, viz. quod " cum prædictus Willielmus primo Die Aprilis Anno Do- " mini milleſimo ſexcenteſimo nonageſimo tertio, apud Pa- " rochiam Sancti Clement' Dacorum in Com' Middl' præ- " dict' indebitatus fuit præfat' Barnabæ in Vita ſua in viginti " Libris bonæ & legalis Monetæ hujus Regni, pro Opere " & Labore ſuis in Vita ſua ad ſpecialem Inſtantiam & Re- " quiſitionem ipſius Willielmi prius ibidem fact' & perform'; " & ſic inde indebitat' exiſten' prædictus Willielmus poſtea " & poſt Mortem ipſius Barnabæ, ſcilicet primo Die Aprilis " Anno Regni dictæ Dominæ Reginæ nunc octavo, apud Pa- " rochiam prædictam in Comitatu prædicto, in Conſideratione " inde ſuper ſe aſſumpſit, & eidem Johanni adtunc & ibidem " fideliter promiſit quod ipſe prædictus Willielmus prædict' " viginti Libr' eidem Johanni cum inde poſtea Requiſit' " eſſet bene & fideliter ſolvere & contentare vellet; cum- " que etiam prædictus Barnabas in Vita ſua, ſcilicet, eodem " primo Die Aprilis Anno Domini milleſimo ſexcenteſimo " nonageſimo tertio, apud Parochiam prædictam in Comita- " tu prædicto, ad ſpecialem Inſtantiam & Requiſitionem ip- " ſius Willielmi impendiſſet & adhibuiſſet alia Opera & La- " borem ſua in & circa quædam alia Negotia ipſius Wil- " lielmi, idem Willielmus in Conſideratione inde poſtea &

What Words will bring a Plaintiff out of the Statute of Limitations.

The Declaration.

" poſt Mortem ipſius Barnabæ, ſcilicet primo Die Aprilis
" Anno octavo ſupradicto apud Parochiam prædictam in Co-
" mitatu prædicto ſuper ſe aſſumpſit & præfat' Johanni ad-
" tunc & ibidem fideliter promiſit quod ipſe idem Williel-
" mus tant' Denar' ſumm' quant' ipſe idem Barnabas de eo-
" dem Willielmo proinde rationabilit' habere meruiſſet eidem
" Johanni bene & fideliter ſolvere & contentare vellet. Et
" idem Johannes Williams in facto dicit quod ipſe idem
" Barnabas in Vita ſua proinde de eodem Willielmo rationabi-
" lit' habere meruit al' Summ' viginti Librarum ſimilis
" legalis Monetæ Magnæ Britanniæ, prædict' tamen Williel-
" mus ſeparales Promiſſiones & Aſſumptiones ſuas præ-
" dictas in forma prædicta factas minime curans ſed ma-
" chinans & fraudulenter intendens eundem Barnabam in
" Vita ſua, & prædictum Johannem Williams poſt Mortem
" ipſius Barnabæ de prædict' ſeparal' Denar' Summ' in eiſ-
" dem ſeparal' Promiſſion' ſic ut præfertur mentionat' cal-
" lide & ſubdole decipere & defraudare prædictas ſeparal'
" Denariorum Summas ſeu aliquem inde Denar' eidem Bar-
" nabæ in Vita ſua aut prædicto Johanni Williams poſt
" Mortem ipſius Barnabæ (cui quidem Johanni Adminiſtra-
" tio omnium & ſingulorum Bonorum & Catallorum, Ju-
" rium & Creditorum, quæ fuerunt præfat' Barnabæ Tem-
" pore Mortis ſuæ per Thomam Providentia divina Cantuar'
" Archiepiſcopum totius Angliæ Metropolitanum decimo
" Die Januarii Anno Domini milleſimo ſeptingenteſimo a-
" pud Parochiam prædictam in Comitatu prædicto debito
" modo commiſſa fuit) nondum ſolvit ſeu aliqualiter pro
" eiſdem contentavit, licet ad hoc faciend' idem Willielmus
" per prædictum Barnabam in Vita ſua & per prædictum Jo-
" hannem poſt Mortem ipſius Barnabæ eodem primo Die
" Aprilis Anno octavo ſupradicto ſæpius requiſit' fuiſſet, ad
" Damnum ipſius Johannis quadragint' Libr' Et inde pro-
" ducit Sectam, &c. Et idem Johannes profert hic in Cur'
" Literas Adminiſtrator' prædict', quæ Commiſſion' Ad-
" miniſtrat' prædict' præfat' Barnabæ in forma prædicta
" teſtantur, &c.

Plea non aſſumpſit infra ſex Annos.

" Et prædictus Willielmus per Robertum Greenway jun'
" Attorn' ſuum venit & defendit Vim & Injuriam quan-

" do, &c. & dicit quod prædictus Johannes Williams Ac-
" tionem ſuam prædictam inde verſus eum habere ſeu ma-
" nutenere non debet, quia dicit quod Billa prædicti ipſius
" Johannis primo exhibita fuit in Cur' hic Die Mercurii
" prox' poſt Quinden' Paſchæ Termino Paſchæ Anno Regni
" Dominæ Annæ nunc Reginæ Magnæ Britanniæ &c. no-
" no & non antea, quodque ſeparal' Cauſæ Action' prædict'
" in Narr' prædict' ſuperius mentionat' non accrever' nec
" eorum aliqua accrevit præfat' Barnabæ Moye in Vita ſua
" ſeu prædicto Johanni poſt ejus Mortem ad aliquod Tem-
" pus infra ſex Annos prox' ante Diem Exhibitionis Billæ
" præfat' Johannis prædictæ modo & forma prout prædict'
" Johannes ſuperius inde verſus eundem Willielmum queri-
" tur; Et hoc paratus eſt verificare. Unde petit Judicium ſi
" prædictus Johannes Actionem ſuam prædict' inde verſus
" eum habere ſeu manutenere debeat, &c.

William Hall.

" Et prædictus Johannes dicit quod ipſe per aliq' per præ- The Repli-
" fat' Willielmum ſuperius placitando allegat' ab Actione ſua cation.
" prædicta inde verſus eundem Willielmum habend' præcludi
" non debet; quia dicit quod ſeparal' Cauſæ Action' prædict'
" in Narr' prædict' ſuperius mentionat' accrever' eidem Jo-
" hanni infra ſex Annos prox' ante Diem Exhibitionis Billæ
" præfat' Johannis; Et hoc petit quod inquiratur per pa-
" triam, & prædictus Willielmus inde ſcilit' &c.

J. Baynes.

This Cauſe was tried at *Weſtminſter* the Sitting after the Term, before the Lord Chief Juſtice *Parker*. The Caſe upon the Plaintiff's Evidence appeared to be this: *Barnaby Moye* the Inteſtate, and one *Scarlett* were Partners, who built a Houſe for the Defendant in the Year 1693; afterwards the Defendant failed and came off by the Statute of Compoſition; *Scarlett* dies, then *Moye* dies; Adminiſtration was taken out by the Plaintiff to *Moye*, who in the Year 1708 ſent to the Defendant to be paid his Debt; the Defendant acknowledged the Debt, but inſiſted upon it that he ought

to

to have the Benefit of the Statute of the Major and Minor, by which he paid the reſt of his Creditors only two Shillings in the Pound; and that therefore if the Plaintiff would accept of two Shillings in the Pound as the reſt did, he would pay. It was objected by the Defendant's Counſel, that this Evidence was not ſufficient to take the Plaintiff's Debt out of the Statute of Limitation. My Lord was of Opinion, that as this Caſe was, there being a ſpecial Promiſe laid in the Declaration, it was neceſſary to prove the ſame, to prevent the Operation of the Statute, and that a bare Acknowledgment would not do; and therefore directed the Jury to find for the Plaintiff for 36 *s.* only, for which the Promiſe was made. It was then ſaid by the Defendant's Counſel, that this Declaration was very oddly contrived, for that the Work was done by the Inteſtate *Barnaby Moye*, and the Promiſe alledged to be made to the Plaintiff without any new Conſideration, which was ill. Upon Debate my Lord ordered that there ſhould be a Verdict for the Plaintiff, and the Point reſerved. Afterwards my Lord being attended in his Chamber by Counſel, held, that the Declaration was rightly framed as to this Caſe, and that if it had been otherwiſe, it would not have been good; for if the Declaration had been of a Promiſe made to the Inteſtate, the Evidence given would not have maintained the Iſſue; for the Iſſue would have been upon a Promiſe made to the Inteſtate within ſix Years; and by the Evidence it appeared plainly there was no ſuch Promiſe to the Inteſtate, but only to the Adminiſtrator; that he founded his Judgment upon the Caſe of *Green* and *Crane*, which was *Hill.* 3 *Annæ*, which came before the Court upon a Point reſerved. The Declaration ſet forth, that the Defendant was indebted to the Plaintiff's Teſtator in 20 *l.* for Goods ſold, and being ſo indebted, promiſed to pay the ſame to his Teſtator. The Defendant pleads *Non aſſumpſit infra ſex Annos*, and Iſſue thereupon. The Evidence was, that above ſix Years after the Death of the Teſtator, the Defendant was arreſted for the Debt, and being under the Arreſt, acknowledged the Debt and promiſed Payment, and held, the Promiſe in Evidence would not maintain the Iſſue. My Lord Chief Juſtice *Parker* was then Counſel for the Defendant. In this Cauſe my

Where a Special Promiſe laid, ſhall be proved.

Promiſe to the Adminiſtrator good, without a new Conſideration.

Ld. Raym. 1101. Rep. A. Q. 37.

But muſt be ſo laid in the Declaration.

my Lord Chief Juſtice *Holt* ſaid, that acknowledging a Debt after ſix Years takes it out of the Statute; for tho' he that acknowledges a Debt doth not thereby promiſe Payment, yet it is an Evidence to the Jury of a Promiſe, which creates a new Debt tho' upon an old Foundation. That it is generally ſaid that where there is a Debt ſubſiſting, the Law creates a Promiſe; which is not ſo, for there is no ſuch Thing as a Promiſe in Law: but where a Debt is proved, it is an Evidence that the Debtor promiſed Payment in Fact.

Acknowledging a Debt after ſix Years takes it out of the Statute.

That there is no Promiſe in Law.

In the principal Caſe another Exception was taken, that the Work being done by *Moye* and *Scarlett*, it ought to have been mentioned in the Declaration, that *Moye* ſurvived *Scarlett*; otherwiſe the Plaintiff is not intitled to the Debt. But it was over-ruled, for here the Action was brought upon the expreſs Promiſe to the Adminiſtrator, tho' grounded upon an old Foundation. Tho' had it not been ſo, it would have been well enough; for if *Scarlett* died before the Action, there was no Reaſon to take any Notice of him.

Not neceſſary to name the Partner of the Inteſtate, who died before the Inteſtate.

DE
Term. Paſch.
11 *Georgii* I.
In the COMMON PLEAS.

Wright verſus *Hall.*

The proper Meaning of theſe Words, *the Reſt and Reſidue of all my Lands.* Poſt p. 184.

THE Caſe *ſſ.* The Teſtator deviſed all that his Meſſuage and Tenement in *Edmonton* to *Francis Carter* and his Heirs, and all the Reſt and Reſidue of his Meſſuages, Lands, Tenements and Hereditaments in *Edmonton*, *Enfield*, and elſewhere, to *John Lammas*, his Heirs and Aſſigns for ever.

After the making this Will, the aforeſaid *Francis Carter*, the Deviſee, died in the Life-time of the Teſtator, ſo that this became a lapſed Deviſe by his Death; and then the ſole Queſtion in Ejectment was, Whether this latter Clauſe of the Will would carry over the lapſed Deviſe to *John Lammas*, the Reſiduary Deviſee, or whether it ſhould deſcend to the Heir at Law of the Teſtator?

Caſes in Law and Equity, p. 221. and Goodright and Opie, id. 123.

It was admitted, that ſuch a reſiduary Clauſe would carry over a lapſed Legacy to a reſiduary Legatee from an Executor; but the Doubt was, whether it would carry it from the Heir at Law.

Thoſe who argued that it would not, cited many Authorities in the Books, where 'tis expreſsly adjudged, that an Heir at Law ſhall not be diſinherited, but by very plain

and clear Words, or by ſome neceſſary Implication from expreſs Words, which ſhew, that the Teſtator did intend to diſinherit him.

The Court held, that the Deviſe of all the Reſt and Reſidue of my Meſſuages, Lands, *&c.* did not convey what was expreſsly deviſed before: For Wills muſt be conſtrued from the Intent of the Teſtator at the Time of making the Will, which appears to be to give his whole Eſtate to *Carter* and his Heirs, in that Meſſuage; and at the Time of the Will made, he had no Reſt and Reſidue left in that Houſe, and the Deviſe to *Carter* being void, the Houſe will go to the Heir at Law, and not to *John Lammas.* Curia.

This was the Authority and Foundation of another Caſe which was of the ſame Nature; *viz.* that the *Reſt and Reſidue of my Lands undeviſed* muſt be meant at the Time of making the Will; and this was the Caſe of *Roe* and *Fludd, Paſch.* 2 *Geo.* 2. See the next Caſe.

DE
Term. Paſch.
2 *Georgii* II.
In the COMMON PLEAS.

Roe and *Fludd.*

All the Reſt and Reſidue of my Lands undiſpoſed of, that is expounded *the Reſt and Reſidue at the Time of making the Will.* Ante 182, 183.

THIS was a Deviſe of Lands to *R. Biſhop* and his Heirs for ever, upon Condition he pay all my Debts and Legacies and Funerals, and if he do not pay them, then I deviſe the Premiſſes to Mrs. *Elizabeth Fludd* [the Defendant] and her Heirs for ever. And as to all the Reſt and Reſidue of my real and perſonal Eſtate whatever not before herein bequeathed, I give and bequeath to *Elizabeth Fludd* and her Heirs; the Deviſee *R. Biſhop* died before the Deviſor, ſo it was a lapſed Legacy, and the firſt Queſtion the Counſel made, was, whether this was an executory Deviſe to *Elizabeth Fludd?* and it was obſerv'd, that an executory Deviſe was not known till after the 29th of *H.* 8. for there was a Caſe where a Fee was deviſed on Condition, which if not performed, the Lands were deviſed to go to *A.* in Fee; the Condition was broken, *A.* entered, and it was held, that the Heir might enter, and that the Deviſe over was void, being a Remainder after a Fee. *Dyer* 33. And ſoon after the Deviſe over was held a Limitation over and no Remainder; and ſo is *Goodright* and *Hammond*, *Paſch.* 7 *Geo.* 1. If my Daughter *Elizabeth* (who was Heir) ſhould die before her Mother, or without Heirs, and my Wife have an Heir Male by another Huſband, I deviſe to him the ſaid Lands, but if my Wife fail of an Heir Male, and my Daughter failing of Heirs, I deviſe over to *A. Biſhop.*

At what Time executory Deviſes began to be allowed.

Cur' held, that the ſubſequent Deviſe cannot be a Remainder, becauſe the firſt Deviſe is void and has no particular Eſtate to ſupport it. *Pell* and *Brown*, *Cro. Jac.* 590. *Bridg.* 1, 3. *Palm.* 131. 2 *Rol. Rep.* 196, 216. *Godb.* 282. But by Chief Juſtice *Eyre* and *tot' Cur'* this cannot be an executory Deviſe to *Elizabeth Fludd*, unleſs it were an original Deviſe, here is no firſt Deviſee, for he is dead and that Deviſe void; but the next Queſtion was, if *Elizabeth Fludd* ſhould take by the ſubſequent Words *All the Reſt and Reſidue of my real and perſonal Eſtate whatſoever not before herein bequeathed, I give and bequeath to* Elizabeth Fludd *and her Heirs?* and the Court held, that the firſt Deviſee dying before the Deviſor, this executory Deviſe being as a Condition annexed to *R. Biſhop*'s Eſtate, or a Limitation that depends on the firſt Deviſe, if that Eſtate be gone the Condition is gone too; and further the Court held, that *Elizabeth Fludd* could not take by the ſaid Words *All the Reſt and Reſidue of my real and perſonal Eſtate not deviſed or unbequeathed*, tho' a lapſed Legacy, for it muſt be expounded *the Reſt and Reſidue of the Lands undeviſed at the Time of making the Will*, and not *at his Death*; and ſo Judgment was given for the Plaintiff; and the Caſe relied on, which was in Point, was *Paſch.* 11 *Geo.* 1. *Hall* and *Right*; and *Vide Goodright* and *Opie*, *Mich.* 10 *Geo.* 1. *B. R.*

Curia, this not an executory Deviſe.

1 M. Caſes 123.

DE
Term. Sanct. Trin.
8 & 9 *Georgii* II.
In the COMMON PLEAS.

Forſter verſus *Pollington and Patience his Wife.*

Rules for Amendments of Writs of Covenant, &c.

CHAPLE mov'd to amend a Writ of Covenant of Lands in the Iſland of *Antego*; it was of ſo many Acres of Land, &c. *in Inſula Antego in America in Partibus tranſmarinis, viz.* in St. *Mary Iſlington in Com. Surry*; and now what he moved to amend was to ſtrike out *in America in Partibus tranſmarinis.* It ſeems, the Maſter of the Rolls made an Order to amend it, but upon Application to Lord Chancellor *Talbot* to diſcharge it, he made an Order to ſet it aſide, becauſe it did not appear that the Officer had gone contrary to his Inſtructions. *Gage*'s Caſe on a Writ of Error in *B. R.* 5 *Co.* 46. *Blackmore*'s Caſe, a ſuperior or inferior Court may amend if they have any thing to amend by; ſo they may amend a Fine if they have the Inſtructions to the Curſitor to amend by. 18 *Eliz. Norris* and *Braybroke*, Error to reverſe a Recovery, and in the Writ of Entry the Teſte was after the Return; and becauſe it appeared to be the Miſpriſion of the Clerk it was amended; and there was *Bohun*'s Caſe, the King's Silver, it ſeems, was not entered for the Manor as well as for the other Lands, this was moved in the Common Pleas; and *per Cur'* this was only the Miſpriſion of the Clerk, and therefore amendable; and really and truly it came out that 40 *s.* was paid to the King for a Fine for the whole Lands and Manor too. Lord *Pembroke*'s Caſe was cited *Salk.* 52. but that was only a Caſe referred to the

A great Variety of Caſes of Amendment. 8 Co. 156.

Moor 125. 1 Leon. 22. Cro. Eliz. 389.

The general Rule is where the Inſtructions were right. Carth. 111. Skin. 273.

Judges, and there ſaid, that a Writ of Covenant being an Original was not amendable by the Common Law or by the Statute; but it is much otherwiſe, for they may amend a Teſte at Common Law if there be any thing to amend by. *Smith* verſus *Bowen*, *Trin.* 7 *Annæ.* A Roll was amended by a Bill in an Appeal of Murder, it was *Murdum* for *Murdrum*. *Raym.* 71. in *B. R.* A Caption of a Warrant of Attorney in a Recovery after the *Dedimus*, was helped by the Statute as not being Subſtance. If Inſtructions be given to the Curſitor to make out a Writ, and *A.* ſuppoſe therein named, be called *Miles*, but the Curſitor names him *Gen'*, this may be amended on the Examination of the Curſitor, and on producing his Inſtructions, becauſe it was the Fault of the Curſitor. *Ro. Abr.* 198. If an original Writ of Ejectment ſhould be *deviſit* inſtead of *dimiſit*, it may be amended, becauſe this appears to be the Fault of the Curſitor. *Id.* & *Hob.* 324. An original Writ has two material Parts, the firſt is, an artificial Form according to Law, which the Officer, *ex Officio*, ought to take care of by his Skill and Underſtanding without the Inſtruction of the Parties; and the ſecond is the Inſtruction of the Party, which the Officer could not know, 5 *Co.* 45. *Freeman*'s Caſe, *Diſtrictions* for *Deſtructionis*, *Moor* 571. *Noy* 171. Now the Covenant of *Pollington* and his Wife was to convey and aſſure all that Plantation in *Antego* in *America.*

Rep. Annæ 216, 230, 254.

The Fault is the Fault of the Officer.

Two material Parts of an original Writ.

1 D'Anv. 351. pl. 10. Cro. Eliz. (462.)

Now *per* Chief Juſtice & *tot Cur'*, what was done in Chancery by the Lord Chancellor and Maſter of the Rolls is of no Efficacy; for, tho' all original Writs iſſue out of Chancery, yet when returnable into this Court their Power ceaſes; and it now being returned here, it is in the Breaſt of this Court, and we are all of Opinion it ought to be amended, and the Words *in America in Partibus tranſmarinis* ought to be ſtruck out; and indeed this is amendable by the Writ of Covenant itſelf, becauſe it is a Contradiction and Nonſenſe; and we will expunge the Nonſenſe, and then the Writ is right; for the ſame Lands cannot lie in Parts beyond the Seas in *America*, and in the County of *Surry* too in *England*. So that this is Matter of Form only, for the Inſtructions could be no other but in common ordinary Form.

Chancery not the proper Court to amend this Writ.

The Amendment allowed.

Nota.

Gage's Caſe 5 Co. 46. overthrown.

Nota: *Gage*'s Caſe before cited is miſreported, and not Law. *Vide* Lord *Pembroke*'s Caſe, 1 *Salk.* 52. *Gage*'s Caſe was a Wrrit of Error brought by *Gage* verſus *Tawier* to reverſe a Fine, where the Return of the Writ of Covenant was before the Teſte; and the Court held it ſhould be amended, whereas really and truly the Judgment was for the Reverſal of the Fine, and the printed Report is expreſsly contrary to the Judgment in the Caſe, and this ſo atteſted by the two Serjeants *Harris* and *Nichols*; and *Nichols* ſaid he was of Counſel with *Tawier* in this Caſe, and ſaid that the Reaſon of the Judgment was becauſe that there was no Matter to lead the Clerk who made the Writ to make it of ſuch a Teſte; and the Original being the Ground and Foundation, the firſt Act cannot be amended by the ſubſequent Records and Proceedings, as they might be by the Original if that was not miſtaken and erroneous. And the Caſe cited in *Gage*'s Caſe of 11 *H.* 6. 2. concludes nothing to the Purpoſe. This I had from a Manuſcript of Lord *Macclesfield*'s on *Gage*'s Caſe.

Trin. 8 & 9 *Georgii* II. in the Common Pleas.

Roger Acherly verſus *Bowater Vernon & al'.*

A Man deviſes an Annuity charged on his real Eſtate to his Siſter and Heir at Law (who is a Feme Covert) and a Portion for her daughter, not having

IN an Action of Debt for 5700 *l.* the Caſe was, *Thomas Vernon*, Eſq; being ſeiſed in Fee, by his Will of 17 *June* 1711. deviſed to his Wife out of the Manor of *Shrawley* and other Lands and Tenements in the County of *Worceſter*, an Annuity or Rent-Charge of 1000 *l.* a Year for her Life, clear of all Charges except Parliamentary Taxes, in lieu of her Jointure.

and by Codicil ſays, on Condition that they releaſe all Right, &c. Debt cannot be maintained for the Arrears of the Annuity incurred during the Coverture, the Siſter being dead, and releaſed.

And by the ſame Will deviſed to his Siſter *Elizabeth Acherley*, the Plaintiff's Wife, 200 *l.* a Year out of the Rents of his ſaid real Eſtate, to be received by her own Hands for her ſeparate Uſe, excluſive of her preſent or any future Huſband; and to be made up 400 *l.* a Year from his Wife's Deceaſe during his Siſter's Life. And deviſed to *Lætitia* her Daughter 1000 *l.* for her Portion.

And after a Deviſe of other Eſtates to *William Vernon*, *&c.* he deviſed all the Reſidue of his real and perſonal Eſtate (his Debts, Legacies and Funeral Expences firſt paid) unto his Brother *Roger Acherly*, *George Vernon*, *George Wheeler*, *John Bearcroft*, and *Richard Vernon*, their Heirs, Executors and Adminiſtrators, upon Truſt and Confidence, that after the Annuities and annual Rents before deviſed to his Wife and Siſter, *&c.* paid, the ſaid Truſtees ſhould inveſt the Reſidue of his perſonal Eſtate in the Purchaſe of Lands, *&c.* and ſhould ſtand ſeiſed of all his real and perſonal Eſtate, during his Wife's Life, to the Uſes and Purpoſes in the ſaid Will; and after the Deceaſe of his Wife (in caſe he die without Iſſue then living) ſhould ſtand ſeiſed of all his Manors, Meſſuages, Lands, Tenements and Hereditaments, and Lands to be purchaſed with a Surplus of the perſonal Eſtate, and ſhould ſettle the ſame to the Uſe of *Bowater Vernon* for ninety-nine Years, if he ſo long live, with Remainders over, *&c.*

And directed, that his Truſtees during his Wife's Life ſhould pay the clear Surplus of the Profits of his real and perſonal Eſtate, after Payment of the ſaid Annuities, Debts, *&c.* to the ſaid *Bowater Vernon* for ſo long Time as he ſhould live, and after his Deceaſe, to his firſt and other Sons in Tail Male, *&c.* And by Codicil, 2 *Feb.* 1720. two Days before his Death, *Thomas Vernon*, the Teſtator, having purchaſed other Lands, deviſed the ſame to his Truſtees and Executors, ſubject to the ſame Truſts or ſame Uſes to which he had deviſed the Bulk of his Eſtate, *&c.* Then revoking that Part of the Will that appoints *Roger Acherly*, *George* and *Edward Vernon* three of his Truſtees, he deſires *Francis*

Keck and *John Nichols* to be two of his Truſtees; then ſays in his Codicil, that he had made a Will of the Date aforeſaid, and then ſays, I hereby ratify and confirm the ſaid Will, except in the Alteration hereafter mentioned: And I will that the Portion to my Niece *Lætitia*, Daughter of my Siſter *Acherly*, ſhall be made up 6000 *l.* And then goes on, But my Will is, that what I have ſo given to my Siſter and Niece be accepted by them in Lieu and Satisfaction of all they or either of them might claim out of my real or perſonal Eſtate, and upon Condition that they releaſe all Right and Title, *&c.* to my Executors and Truſtees of my Will. And the Queſtion is, if the Plaintiff can maintain Debt againſt the Defendant for the Arrears of this Rent-Charge during the Coverture?

This Caſe was argued many Times by Counſel of all Degrees, and held ſeveral Years, the Subſtance of whoſe Arguments is as follows:

Argument for Defendant; that this is a Condition precedent.

This Queſtion reſts upon the conditional Clauſe which makes the Releaſe a Condition precedent, and it is agreed by the Caſe, that the Right is not releaſed, that the Condition precedent muſt be ſhewn to be performed, or nothing veſts; which appears by the Caſes that are mentioned, 1 *Rol. Abr.* 415. *ſect.* 11. *Pl. Com.* 30. 2 *Vern.* 340. 1 *Sand.* 215. And this muſt be a Condition precedent as to the Legacy to the Niece; and ſhall the ſame Words make the Condition precedent to the Niece and not to the Siſter? for this Clauſe takes in the 600 *l.* to *Lætitia* as well as the Annuity; it is one intire Clauſe, and how can there be had the Benefit and Advantage intended by the Will, unleſs the Eſtate can be abſolutely freed from the Suits and the Actions of the Family of the *Acherly's* and their Heirs for ever. This is only *ſub modo*, and they would have it abſolute. 1 *Ro. Abr.* 416. *pl.* 9. 7 *Co. Oughtred's* Caſe.

It is true, if a Condition precedent be impoſſible, perhaps in ſuch a Caſe it may be an Excuſe, but in this Caſe 'tis not impoſſible; and ſo is *Berkly* and *Falkland*, 2 *Salk.* 231. for they might legally and according to Law levy a Fine.

2 *Vern.* 344. But ſuppoſe it was a Condition ſubſequent, it is ſtill executory, and the Intention was, there ſhould be *Quid pro quo*, but they would have it abſolute; and if ſo, the whole Will cannot be performed, and ſhe had her whole Life to perform it in.

Whether precedent or ſubſequent it ought to be performed.

Firſt, Mr. *Vernon*'s View was to ſettle his Eſtate in the Male Line, and in his Name; his next View was, that there ſhould be Peace in the Family, and that the Eſtate ſhould be injoy'd in Peace; and therefore he orders a Releaſe, but at the ſame time gives the Female Heir and her Daughter an handſome Annuity, and Sum of Money in the Beginning of his Will. Now in the Nature of the Thing, and to complete his Scheme, it muſt be an immediate Releaſe, otherwiſe the Family could not be at Peace; and it was his main View to ſet them quite at Eaſe. But then 'tis ſaid a future Releaſe would do; but anſwered, he could never intend a future Releaſe, becauſe it might become impoſſible, ſhe might have died in a Month after, and leaving the greateſt Part from the Heir, muſt of Neceſſity provoke to Suits; *ergo*, he meant to ſtop them. It is plain he meant a preſent Releaſe, for he knowing ſhe was a Feme Covert, muſt mean ſuch a Releaſe as ſhe as a Feme Covert could give, and that is a Fine.

The Teſtator's Intention conſidered, *viz.* to have Peace in the Family.

But it is objected, that a Fine and Releaſe are ineffectual: *Anſwer*, That is not ſo, and has been ſaid before; but ſuppoſe they were, ſhe ought to have perform'd it, for ſhe is not a Jugde of that. For both in a Covenant and a Condition the Party muſt go as near as poſſibly he can to the Performance, and both might join.

If preciſe Performance be impoſſible, the Party muſt go as near as poſſible.

Where a Man is bound to do a Thing, he ought to do all that which depends upon it in the Performance of the Thing. 11 *H.* 4. 25. 6. You muſt perform and do all that is in your Power to do towards Performance. *Paſch.* 13 *W.* 3. 110. *Lancaſhire* and *Killingworth*. *Vide* 14 *H.* 8. 20, 22.

2 Salk. 623. 3 Salk. 342. Caſes B. R. 529.

It

Where Part poſſible, and Part impoſſible.

It muſt have been done, tho' Part of the Condition poſſible and other Part not, the Will of the dead muſt take Place.

If a Condition be in the Copulative, and is not poſſible to be ſo perform'd, it ſhall be taken in the Disjunctive. 21 *Ed.* 4. 44. As if the Condition be, that he and his Executors ſhall releaſe, this will be taken in the Disjunctive. *Ro. Abr.* 444.

Words make a Condition in a Will which do not in a Deed.

Many Words in a Will do make a Condition in Law that make no Condition in a Deed, as a Deviſe of Lands to *A. ad ſolvend.* 50*l.* to *S.* this amounts to a Condition. *Co. Litt.* 236. *b.*

It is no new Thing for a Feme Covert to levy a Fine, and ſhe may releaſe without Warranty. *H.* 4. 7 *H.* 4. 23 *Ro. Abr.* tit. *Fine* 20. But 'tis ſaid the Huſband may diſſent; but he cannot diſſent but by bringing a Writ of Error, and he cannot aſſign it for Error, becauſe it is for his Advantage, for he is intitled to this Annuity in her Right; by this it appears he is not hurt, ſo it cannot be ſuppoſed he would diſſent. An Infant may levy a Fine, and no Body can reverſe it but himſelf, and that muſt be during his Nonage; an Ideot may levy a Fine, and if it were for his Advantage the Court would receive it. 17 *Ed.* 3. 53. *Plowd.* 343. *b.*

An Infant, or Ideot may levy a fine.

A Codicil is Part of the Will.

Then it is objected, that this is by Codicil, and not in the Will itſelf. The Anſwer is clear, the Codicil is Part of the Will, and the moſt material Part becauſe laſt made.

A Feme Covert may levy a Fine.

A Feme Covert may levy a Fine, and this will bar. 10 *Co.* 43. She cannot be barred by any other Conveyance, as a Statute, Recogniſance, or Inrolment, but whatever ſhe is examin'd to ſhe may be barr'd by; as upon a Writ of Right ſhe is to be examined. 44 *Ed.* 3. 28. If a Recovery be had againſt a Feme Covert, or if a Fine be levy'd by her, this will bar her for ever, and her Heirs. 9 *Ed.* 4. 29. *Bro. Abr.* tit. *Error*, 92.

The Will and Codicil make but one Will, the very Meaning of the Name *Codicil* is *a little Will*; and this was determined in the Houſe of Lords, the Judges Opinions then attending being aſk'd on an Appeal from Lord *Macclesfield*'s Decree, on this Queſtion, *If this Codicil be in a ſeparate Writing and not annexed to the Will, but only ſaid to be annexed*, whether it was a Republication of the Will? and they held it was, and that the Codicil and Will made but one compleat Will, and the Decree was affirm'd. But when argued before Lord *Macclesfield*, as in the printed Caſe, he was clearly of Opinion, it was a Condition precedent; as afterwards Lord *King* was of the ſame Opinion in a Cauſe wherein this very Plaintiff and his Wife were Plaintiffs.

The Will and Codicil make but one Will.

A Codicil a good Republication of a Will, tho' only ſaid to be annexed.

The Caſe in 1 *Saunders* 216. is very ſtrong. *Peters* and *Opie*, 1 *Vent.* 177. *per Hale.* *Pro Labore* is a Condition precedent. *Co. Litt.* 204. *a.* 2 *Saund.* 351. *Hob.* 41. In Things executory *Holt* is of the ſame Opinion.

If the Condition be to infeoff the Obligee, tho' the Obligee diſſeiſes him of the Land, yet that will not excuſe the Performance, for he might enter again. *Ro. Abr.* 453.

He that has the Advantage by the Condition ought to do as much as he can; for he that has need muſt blow the Coals, 14 *H.* 8. 23. if you cannot ſtrictly perform it. As if the Condition be to infeoff *A.* and *B.* and *A.* dies, you muſt infeoff *B. Ro. Abr.* 451, yet it may be ſaid, that it became impoſſible by the Act of God to perform the Condition.

Cy pres.

If an Annuity be granted *pro Concilio impendendo*, and the Grantee refuſes to give Counſel, the Annuity ceaſeth; this makes the Grant conditional. *Co. Litt.* 204.

Suppoſe a Feoffment in Fee made *ad faciendum*, or *ea Intentione*, or *ad Effectum ſequentem*, or *propoſitum*, that the Feoffee ſhall do ſuch an Act, none of theſe Words make a Condition in a Deed; but in a Will they do. *Co. Litt.* 204.

N. B. I do not remember that the late Lord Chief Juſtice *Reeve* ever gave any Opinion that it was a Condition ſubſequent, and it was argued but once in his Time as I remember.

Ld. Ch. J. *Willes* gives the Reſolution of the Court.

After all the Arguments were over, in *Eaſter* Term 12 *Geo.* 2. Chief Juſtice *Willes* gave the Reſolution of the Court, the Subſtance of which was as follows, and was much approv'd of; the Queſtion is, whether the Plaintiff is intitled to recover the Arrears of this Annuity, the Wife having never releaſed according to the Condition.

The *Firſt* Queſtion is, whether it be a Condition precedent; or, *Secondly*, whether it be Condition ſubſequent; and, *Thirdly*, Suppoſe the Condition were ſubſequent, yet whether it muſt have been performed in her Life-time. We are of Opinion, the Intent of the Deviſor is plain and clear, that they ſhould releaſe in order to injoy the Eſtate in Peace, and to preſerve his Name and Family; but never could intend they ſhould have Liberty to ſue and be vexatious when the Intent is clear and plain. Theſe are the Words of the Condition: "My Will is, that what I have ſo given to my Si- "ſter and Niece be accepted by them in Satisfaction of all "they or either of them might claim out of my real or "perſonal Eſtate, and upon Condition that they releaſe all "Right and Title, *&c.* to my Executors and Truſtees of "my Will." My Brothers are of Opinion it is a Condition precedent; now the ſame Words will make it a Condition ſubſequent as well as precedent. *Peters* and *Opie*, 2 *Saunders* 350. 1 *Vent.* 177, 214. *Thorpe* and *Thorpe* is ſo too; ſo in the Caſe of *Turner* and *Goodwin*. *Hob.* 41. Grant of an Annuity *pro Concilio impendendo.*

(Lutw. 245, 249. 1 Salk. 171.

1 D'Anv. 758. pl. 8.

Eq. Abr. 111. pl. 4. 1 Mod. Rep. 300.

My Lord *Hale* ſaid, that Wills are like Acts of Parliament. *Bertie* and *Falkland*, and *Fry* and *Porter*. All the Words are in the Preſent Tenſe. But *Large* and *Cheſhire* is in Point. Now the Will and Codicil make but one and the ſame Will; and has been ſo determined.

The Will and Codicil make but one Will.

In

It has been objected, it is not in her Power; yet ſtill ſhe ſhould have got her Huſband to releaſe with her, ſo not an impoſſible Condition; for ſhe might releaſe by Fine. 10 *Co.* 43. *a.* If ſhe had levy'd a Fine by herſelf it would have been good till ſet aſide.

Secondly, Suppoſe it were a Condition ſubſequent, yet it ought to be performed during her Life; 'tis not made impoſſible by the Act of God, therefore ſhe ought to have performed the Condition; therefore it is her own Laches; for ſhe cannot have Time till her Death, that would be very abſurd.

If it be a Condition ſubſequent, it ought to be performed in her Life-time.

It has been objected, there ſhould be a Requeſt; but there is nothing in that, for they need make no Requeſt; for it was incumbent on her to perform the Condition that was for her Benefit. 1 *Sand.* 215. So Judgment *per tot Cur'* for the Defendant.

A Requeſt not neceſſary.

Judgment for the Defendant.

DE

Term. Sanct. Mich.

9 *Gulielmi* III. In the King's Bench.

The Caſe of *Du Caſtro* a Foreigner.

THE Defendant being a Foreigner, as the Counſel urged, and therefore not intitled to have a *Habeas Corpus*, becauſe not within the *Habeas Corpus* Act; Sir *Bartholomew Shower* mov'd he might be diſcharg'd; for, if a *Habeas Corpus* were brought, Mr. Attorney General would have returned that he was an Alien. This *Du Caſtro* was committed

Habeas Corpus if it be for a Foreigner.

committed by Order of the Secretary of State for a Spy, and had been impriſoned a Year and an Half, and then admitted to Bail, and now no Proſecution againſt him, ſo he was diſcharged.

DE
Term. Paſch.

13 *Gulielmi* III. In the King's Bench.

Mr. *Archer*'s Caſe.

Habeas Corpus to bring up a Daughter.

1 L. *Raym.* 653.

SIR *Bartholomew Shower* mov'd for a *Habeas Corpus* to be directed to *John Archer* the Father, to bring up the Body of *Eleanor Archer* his Daughter. The Motion was founded upon two Affidavits made by Servant Maids; they made Oath, That the Father ſwore that he hated her more than any Thing living, and ſhould be glad of an Opportunity of killing her, and if he had, he would ſhoot her thro' the Head, and that ſhe often ſaid ſhe was afraid of being murder'd in her Bed by him.

Has been in caſe of a Wife.

Upon Sir *Edward Northey*'s ſaying, an *Habeas Corpus* had been granted on a Letter, and in the Caſe of a Wife, Chief Juſtice *Holt* ſaid it had been granted on leſs than that. It was argued ſhe was eighteen Years of Age, and ſo might have choſe her Guardian tho' her Father was living.

Ha' Cor' in Term-time returnable on a Day certain, and not *immediatè*.

Holt C. J. Theſe Writs are never returnable *immediatè* in Term-time, but on a Day certain.

It was argued by Counſel of the other Side, that her Father was afraid ſhe would be ſtolen away, and that it had been attempted to ſteal her away, ſhe being a great Fortune, and

and therefore he was obliged to keep her with ſome Strictneſs. *Per Holt & Cur'*; let there go an *Habeas Corpus* to bring her up to be examined; it being ſixty Miles off, take to this Day ſeven-night. Then it was mov'd that ſhe might be conducted by the *Poſſe*, elſe this might be a Contrivance to ſteal her away. The Chief Juſtice ſaid, perhaps that might be granted on Affidavit, but he never knew it done, and therefore it was denied.

Court refuſes to grant the *Poſſe*.

According to this Writ, the Daughter came into Court on the Day appointed, with her Father, and the Writ not being return'd, the Court ſaid they could not proceed till the Writ was return'd and filed, and the Writ was immediately return'd in Court, and the Return was, that he had her ready to be delivered to the Court. *Holt* C. J. ſaid he would conſider of this Return; for, thereby you confeſs ſhe hath been detained, and returning no Cauſe at all, you may conſider whether ſhe is not at Liberty. But upon Examination of of the Daughter by the Court ſecretly, ſhe diſowned her Father was unkind to her, that he had never beat her, only once gave her a flip with his Glove, and ſaid ſhe was willing to go Home and live with her Father again; and the Court ordered ſo accordingly, and ſhe went away with her Father.

Return *para' habeo.*

The Effect of it.

The Lady went back with her Father.

DE
Term. Sanct. Mich.
1 *Georgii* I. In the King's Bench.

Vaux verſus *Mainwaring.*

PER Chief Juſtice *Parker*, Debt is upon the Contract or Sale, but *Indebitatus Aſſumpſit* is an Action on the Promiſe, and lies only becauſe of the Promiſe; if you bring *Indebita-*

Difference between Debt and *Indebitatus Aſſumpſit.*

tus Aſſumpſit for 10 *l.* for a Horſe ſold, if it was ſold for more or leſs, yet the Plaintiff ſhall recover what it was ſold for; but if Debt be brought on that Contract, if it come out to be more or leſs, the Plaintiff cannot recover, for it is a *Præcipe quod reddat* ſo much Money in particular. This was an Action of Debt, that whereas the Defendant bought of the Plaintiff divers Goods and Merchandizes for ſo much Money as they ſhould be worth, to be paid on Requeſt, and ſays in fact they were worth 437 *l.*

The Caſe.

DE
Term. Sanct. Mich.
4 *Georgii* I. In the King's Bench.

The King againſt *Urling*, Judge of the Sheriffs Court in *London*.

What Power an inferior Court has to grant a new Trial, &c.

MOVED for a *Mandamus* to compel him to proceed to Judgment in that Court. It ſeems an Action was brought there, and a Writ of Inquiry of Damages obtained. But the Judge would not give Judgment, becauſe he had a deſign to ſet aſide the Writ of Inquiry, tho' it appeared there was no Irregularity therein; the Court gave their Opinions, that the inferior Judge could not grant a new Trial, nor ſet aſide a Judgment regularly obtained, becauſe it was altering the Law; but by the whole Court it was agreed a Judge of an inferior Court could ſet aſide a Judgment irregularly obtain'd, for that is no Judgment, but void *ab initio*, and not like an erroneous Judgment which is good till reverſed for Error; and therefore the Court made a Rule that the Judge of the inferior Court might examine and inquire if the Writ of Inquiry or Judgment, if any, was by Fraud or Surprize, tho' ſtrictly regular, and if ſo, that he might ſet it aſide without incurring the Contempt of this Court.

DE
Term. Sanct. Mich.
7 *Georgii* I. In the King's Bench.

Owen and *Hughes.*

MR. *Willes* moved to ſet aſide a Rule for Prohibition to the Spiritual Court; the Libel was for removing of the Reading Deſk out of the antient and uſual Place, and the Judge of the Court was he that read Prayers, and the Defendant not appearing, Sentence was againſt him by the Court. *Per Cur'*, there can be no Prohibition after Sentence tho' it be not on the Merits, for you might have appealed, and if he be Judge in his own Caſe, and it appear ſo, yet in the Law that is not allowed, ſo there might be an Appeal to a ſuperior Court, and they might give Relief, and not like the Caſe of an inferior Court, where we are to judge; and by the Court there is no Difference between Sentence by Default, and Sentence after a Hearing; and the Court diſcharged the Rule for a Prohibition.

Prohibition to Spiritual Court.

Judge in his own Cauſe.

Remedy by Appeal.

Rule diſcharged.

DE
Term. Sanct. Mich.
9 *Georgii* I. In the King's Bench.

The King verſus *Mayor and Aldermen of* Carliſle.

Return of a *Mandamus* to reſtore an Officer returned guilty of Bribery.

THIS was a *Mandamus* to reſtore one *John Simpſon* to the Office of Capital Citizen of the City of *Carliſle*, and the Return made was, that he gave a Bribe of ſixty Guineas, together with a Promiſe to his Son to get him an Exciſeman's Place, if he would vote for one *Patteſon* to be Mayor of that City; he and one *Tate* ſtanding Candidates for the ſame; and in their Return they ſhew a Power to remove, and that they removed him *ob cauſas præd'*, having firſt of all ſet out before, that an Information was exhibited *ad Effectum ſequentem*, and then ſet out that Articles were exhibited againſt him to the Effect in the Information, and then ſhew the Offence as before mentioned, and the Oath of the Informer poſitively to the Offence. *Per tot Cur'* this is a good Return without any Conviction at Law, tho' he might have been firſt convicted at Law; for tho' it be an Offence indictable at Common Law, yet being alſo a great Offence againſt the Duty of his Office, the Corporation have a Juriſdiction, there being an expreſs Power to remove; and the Caſe of *The King* and *Lane* went on that Difference, where it was ſaid that to libel another was purely at Common Law, and was no Breach of his Oath. And as to the Form of the Return, the whole Court after ſome little Doubt held it well, becauſe on the whole Return there appeared to be a good Cauſe of Removal.

Corporation may move for Offence againſt his Duty, without Conviction at Law.

DE
Term. Sanct. Trin.

9 *Georgii* I. In the King's Bench.

The King verſus *Doctor Middleton.*

One fined on Confeſſion in Court that he was the Author of a Libel.

IT was moved for an Attachment againſt him for writing a Libel againſt a Doctor of Divinity in the Univerſity of *Cambridge*; the Libel was contained in his Preface to a *Latin* Book about the Library of the Univerſity, Dedicated to Doctor *Snape* then Vice Chancellor; he came into Court voluntarily, and confeſſed that he was the Author, and it was ſo Recorded, and he was fined 50 *l.* and ordered to find Sureties for his good Behaviour. This was an honourable Action in Dr. *Middleton*: For, the firſt Motion was made againſt the Bookſeller for publiſhing the Book, but he was excuſed on his getting the Doctor to confeſs that he was the Author as above.

DE
Term. Sanct. Mich.

10 *Georgii* I. In the King's Bench.

The King againſt *The Chancellor, Maſters and Scholars of the Univerſity of* Cambridge, *or Doctor Bentley's Caſe.*

THIS Caſe is ſtated pretty much at large from the Record, 2 Lord *Raymond* 1334, *&c.* but in Subſtance was as follows.

Mandamus to reſtore to Degrees in the Univerſity.

This was a *Mandamus* granted to reſtore *Richard Bentley* to his Degree of Doctor of Divinity, who was degraded by the Vice-Chancellor's Court in the Univerſity of *Cambridge* for a Contumacy in a Civil Suit, for four Pounds and ſix Shillings, at the Suit of Doctor *Middleton*, without having been heard in any Court.

The Return.

To this *Mandamus* the Univerſity made a Return, in which they did not ſay that they had a Viſitor, which would have put an End to the Diſpute in *B. R.* but they returned a Power in the Congregation or Vice-Chancellor's Court to deprive any Member for Contumacy, and that *Bentley* was Guilty of a Contempt in ſpeaking Opprobrious Words of the Vice-Chancellor, and that he ſaid in this Caſe *Quod ſtulte egit, &c.* and that the Congregation or Vice-Chancellor's Court had deprived him, but did not return that he was ſummoned, as in Fact and Truth he was never ſummoned. There were ſeveral Objections made to this Return. As

1ſt *Obj.* It is not returned, Depoſitions were upon Oath.

Firſt, It does not ſay that the Depoſitions (of his Contempt) were upon Oath, but only ſays the Depoſi-

tions of the Beadle were read: Nor does it appear before whom the Depoſitions were taken; and one may depoſe by Word without Oath.

Second Objection, It is ſaid, that the ſaid Depoſitions were exhibited *De contemptu præd'*, which is uncertain; for they might ſwear *De contemptu*, and yet might ſwear him out of Contempt, ſo that this Return might be True, and yet the Evidence might be he was not Guilty; ſo it may be he was Degraded for not being in Contempt: And ſo is the Caſe of Conviction, *King* and *Green*, *Mich.* 12 *Annæ*, *B. R.* this was a Conviction for ſelling Bread againſt the Aſſiſe, which ſays only that the Witneſs to the Information was ſworn *De Veritate materiar'*, for which the Information was quaſhed: For they ought to ſet out what the Witneſſes ſaid. *Vide Queen* and *Randal*, *Paſch.* 13 *Annæ*. *Obj.* 2. Said that they were *De contemptu*, therefore uncertain.

Third Objection, 'Tis too general to ſay, That the Congregation or Vice-Chancellor's Court may degrade *Propter contumaciam*, but ought to ſet out what the Nature of that Contumacy was. *Obj.* 3. Degrade *Propter contumaciam*, too general.

Fourth Objection, That a Cuſtom for the Univerſity or Vice-Chancellor's Court to create Degrees, cannot be a good Cuſtom. It is not true; for they cannot create, but they may confer, becauſe this is a Right granted to them originally from the Crown. *Obj.* 4. Cuſtom to create Degrees, not good.

Fifth Objection, There is no juſt and reaſonable Cauſe, to degrade for a Contempt in Words only. *Obj.* 5. Contempt in Words not ſufficient, &c.

Sixth Objection, It is no where ſhewn for what Cauſes he was degraded; it only ſays *Et ſuperinde*, and thereupon he was degraded; that is only to ſhew what followed in Point of Time, but nothing elſe. *Obj.* 6. Not ſhewn for what Cauſe, &c.

Seventh Objection, They have exceeded their Juriſdiction very much: For, the Power preſcribed for, is only to deprive from all Degrees in the Univerſity, and this Decree and Judgment is to degrade and deprive him from all Titles, Degrees, *Obj.* 7. They exerciſed more Power than they preſcribe for.

and

and all Rights whatſoever, *Ab omni jure in Univerſitate*, which is not preſcribed for.

Obj. 8. The Party not ſummoned.

Eighth Objection, In the laſt Place the Party Defendant was not ſummoned, which is againſt natural Juſtice, and againſt the Law of God and Man.

Antiquity of theſe Writs, uſed to expedite Juſtice, and prevent Oppreſſion.

Mandamus's or *Mandatory* Writs are very antient, as old as *Edward* the Firſt, if not older; and the Two main Ends of them are to expedite Juſtice and to prevent Oppreſſion in great Bodies of Men, ſuch as Corporations. Returns of *Mandamus's* are Anſwers to the King's Commands, they therefore ought to be true and clear; and indeed they require the utmoſt Certainty, even much greater than an Indictment: For, that may be travers'd, but here the King can't traverſe; but if the Return be not clear, a peremptory *Mandamus* goes; for if the Party quibbles, or prevaricates, he is ſuppoſed not to be able to give a better Anſwer. In the next Place, this is a very proper *Mandamus*, for it is to reſtore a Member of a great Corporation to a great Office, a Dignity and a Freehold. *Firſt*, An Office that concerns the Government of a Corporation, and ſo agreed in the Return. And is not the Government of ſo great an Univerſity as *Cambridge* of as great concern as the Government of a poor Borough? *Secondly*, It is a Dignity meerly Civil, granted originally by the Crown, and conferred by the Univerſity. And it is a Place for Life. But ſuppoſe it Spiritual, the immediate Conſequence would be Loſs of Temporal Profits in his Profeſſorſhip of Divinity, *&c.* *Thirdly*, Beſides, it concerns the Legiſlature, for they choſe Members of Parliament, and are Juſtices of Peace; ſo it concerns the Juſtice of the Nation. It was obſerved that the Vice-Chancellor might have proceeded by the Civil Law in the Abſence of Doctor *Bentley*, and that his not appearing was no Obſtruction to the Proceeding in the Cauſe.

Returns of them ought to be true, clear, and certain.

This *Mandamus* proper.

The Office great.

It is a Civil Dignity,

and for Life.

It concerns the Legiſlature and Juſtice of the Nation.

But this is now made a criminal Proceeding, and founded upon a moſt abominable Doctrine, *i. e.* that a Man cannot repent, that becauſe he has ſaid he will not obey the

Proceſs of one Court, that he will never obey the Proceſs of another. Suppoſe they had committed him for ſafe Cuſtody, muſt he not have had Time to defend himſelf? Sure he muſt. It is a Dignity meerly Civil, granted originally by the Crown, and conferred by the Univerſity; the Dignity is the ſame, whether applied to a civil or ſpiritual Perſon. What was ſaid about Degrees being only Licences to teach was wrong ſaid; for Licences to teach were long before Degrees, which were about the Year 1200, and there was teaching in the Schools long before there were Univerſities; and even in King *Alfred*'s Time there were Licences for teaching School. There was no ſuch thing as a Degree till they were a Body Corporate, and after they were made ſo, and thereupon they had many Grants of great Privileges from ſeveral Kings and Queens of *England*; and in particular they had Grants to them of the Privilege of Proceeding according to the Civil Law; which were all voidable Grants until Queen *Elizabeth*'s time: And then all their Rights and Privileges, (and in particular this of their Proceeding according to the Civil Law in their Courts) were confirmed and eſtabliſhed by Act of Parliament, in as particular a Manner as if they had been recited *Verbatim* in the Act of Parliament, which is ſet out in the Return, otherwiſe they could not have ſet out all their Rights and Privileges.

Degrees are more than Licences to Teach.

Degrees, when they began.

This Cauſe was argued ſeveral Times, and the Court was clearly of Opinion the Return of the *Mandamus* was naught in Form and Subſtance, and ſo ordered a peremptory *Mandamus* to reſtore him to every thing he was deprived of by that Judgment, or Decree, of the Univerſity; and the Court thought moſt of the Objections to the Return to be good, but gave their Judgment for a peremptory *Mandamus* on one of them only, which could not be defended: And that was his not being ſummoned. And it muſt be taken they proceeded according to the Common Law of *England*, unleſs they had ſet out particularly that they proceeded according to the Civil Law, which they might have done. And it is not enough to ſay *Secundum conſ' Univerſitatis.*

The Return ill.

A peremptory *Mandamus* granted,

for want of Summons.

Authorities on that Head.

As to the not ſummoning the Party, I will mention ſome few among very many Caſes. The 39 *H.* 6. 32. the Duke of *Norfolk*, Marſhal of the King's Bench, abſented himſelf, tho' a Place concerning the Adminiſtration of Juſtice, yet there can be no Forfeiture until he be ſummoned; for, he may excuſe himſelf. 9 *Edw.* 4. held by the Chancellor and Judges, that it is required by the Law of Nature that every Perſon, before he can be puniſh'd, ought to be preſent; and if abſent by Contumacy, he ought to be ſummoned and make Default.

In *Charles* the Firſt, *The King* verſus *Barnardiſton*, Recorder of *Colcheſter*, reſtor'd becauſe not ſummon'd.

The Twelfth of *Charles* the Second, *The King* verſus *Campion*, 1 *Sid.* 14.

The Office of Town-Clerk reſtor'd, *The King* and *Glide*, 3 & 4 *W.* & *M.*

The Queen and Serjeant *Whitaker*, *Hill.* 4 *Annæ*, *in B. R.* 2 *Salk.* 434, 435.

DE
Term. Sanct. Mich.
11 *Georgii* I. In the King's Bench.

Aſton and *Blagrave.*

Caſe for Words ſpoken of a Juſtice of Peace, in relation to his Office.

1 Mod. Caſes 270.

THIS was an Action on the Caſe for ſcandalous Words ſpoken of the Defendant as in the Execution of his Office as a Juſtice of Peace, and laid ſo, and that there was a *Colloquium* concerning his Office as a

Juſtice of Peace; and that the Defendant having a Diſcourſe of him and of the Execution of his Office, ſaid theſe Words, *Mr.* Aſton *is a Raſcal, a Villain, and a Lyer.* Raſcal from the *French*, *Raçal*, *Villain*, that is one who is diſhoneſt and corrupt, and to be a *Lyer* ſignifies one that has the habit of Lying, and one who is as bad as a Thief; and the Office of a Juſtice of Peace is partly Judicial and partly Miniſterial. 2 *Cr.* 58.

Raſcal, Villain, Lyer.

The Word *Jacobite* is now Actionable, tho' formerly not ſo. Knave in *Saxon*, ſignified the meaneſt of Servants, but that was in very antient Days; now it ſignifies Falſe and Deceitful. The Queſtion here is, Whether the Words be Scandalous? There is the Caſe of *Duval* and *Price*, of a Juſtice of Peace, ſaying he was diſaffected to the Government; the Judgment was affirmed in the Exchequer Chamber, but that Judgment was reverſed in the Houſe of Lords, becauſe it did not appear they were ſpoken of him as a Juſtice of Peace, and no *Colloquium* laid of his Office of Juſtice of Peace; which infers if it had been, it would lie. And it muſt be underſtood *Lyer* and *Villain* in his Office, taken in common ordinary Senſe and Meaning; for, taking Words *in mitiori ſenſu* is long ſince exploded.

Jacobite, Actionable. Knave.

Show. Parl. Caſes 12. Diſaffected, &c. of a Juſtice of Peace, not laid ſpoken of him as ſuch.

Conſtruction *in mitiori ſenſu* exploded.

Per tot Cur', The Plaintiff ought to have his Judgment; for, the Words are a great Scandal to the Juſtice of Peace, being ſpoken of him as in the Execution of Juſtice; it is as much as to ſay he is a Villain, a Raſcal, and a Lyer in the Execution of his Office: It is ſcandalous to ſay he is a Raſcal, and Villain in his Office; but to ſay he is a Lyer in the Execution of his Office, is as much as to ſay he is partial or corrupt in the Execution of his Office: For, if he were a Lyer in the Execution of his Office, he muſt give falſe Judgments, knowing them to be falſe: For, it cannot be a Lye, unleſs he knows it to be falſe. And tho' it were a right Judgment, and he thought it to be wrong, and ſo intended it, it would be Partiality and Corruption; and the Scripture ſays, *That a Thief is better than a Man accuſtomed to Lying.* And Words now are to be taken by the Court as they import and mean in the Senſe of the Byſtanders,

Judgment for the Plaintiff.

Words, how to be taken?

Gilb. Rep. 117

ſtanders, and in common Parlance, and underſtanding of Words; and not *in Mitiori ſenſu* as the old Rule was, now exploded.

Clancey's Caſe.

What makes a Witneſs infamous, and what not.

UPON a Debate in the Houſe of Lords *December* 15, 1696, relating to the Bill for attainting Sir *John Fenwick* of High Treaſon, the Opinion of all the Judges then preſent, *viz.* *Holt* Chief Juſtice of the King's Bench, *Treby* Chief Juſtice of the Common Pleas, *Ward* Chief Baron of the Exchequer, Juſtice *Turton*, Juſtice *Powell*, Juſtice *Samuel Eyre*, Baron *Powys*, and Baron *Blencow*, was aſked whether *Clancey* (having been convicted of an high Miſdemeanor, of which the Record was produced) in actually giving *George Porter* 300 Guineas, and promiſing more, to withdraw himſelf into *France*, thereby to prevent his further Evidence againſt the Lord *Aylesbury*, the Lord *Montgomery* and Sir *John Fenwick*, for which he had Judgment to ſtand in the Pillory, (and did ſo ſtand) might be admitted a Witneſs, either

Firſt, To confront *George Porter* in his Evidence before the Houſe of Lords.

Secondly, Or to be admitted a Witneſs in any other Caſe.

As to the Firſt, We were all of Opinion he could not, it being utterly improper to permit him, after his Conviction, to come and confront and give Evidence againſt the very Perſon, upon whoſe Evidence he was before convicted by Verdict, and to purge himſelf of that very Crime of which he was ſo convicted.

And as to the Second, We were all of Opinion (Except *Holt* Chief Juſtice, who did ſomewhat heſitate, yet ſaid upon further Conſideration he might alſo agree) that *Clancey* could never after be admitted a Witneſs in any Caſe; for that

he was become Infamous, not that meerly ſtanding in the Pillory or Judgment ſo to ſtand, did of itſelf make a Man infamous to ſuch a Degree as never after to be admitted a Witneſs (tho' *Co. Lit. 6 b.* does ſeem to intimate as much); for, if a Judge ſhould ſentence a Man to ſtand in the Pillory for a Treſpaſs, a Riot, a Libel, or ſeditious Words, and he ſhould ſo ſtand, yet this would not make him Infamous, ſo as never to be admitted a Witneſs; becauſe the Crimes in their own Nature are not perfectly Infamous, but rather Exorbitant in Point of Raſhneſs and Miſbehaviour: But he that has been convicted of, or ſtood in the Pillory for Perjury or Forgery, is truly Infamous. And ſo is this *Clancey*; for his Crime was a baſe and clandeſtine Endeavour to obſtruct the publick Juſtice of the Kingdom; not by diſcourſing or arguing with a Witneſs, or endeavouring to convince him with Reaſon; but by downright bribing and corrupting him with Money: Which no Man would attempt but a baſe, mean and infamous Raſcal; and that to prevent the Diſcovery and Puniſhment of certain Criminals, who had been conſpiring againſt the publick Safety of the Kingdom, as *Porter* had before upon his Oath affirmed. And this was a Crime not meerly of Miſbehaviour, like a Riot or Libel, but even of Corruption relating to Evidence and Teſtimony, and it were againſt Reaſon to admit that Man as a good Witneſs, who has been convicted of bribing and corrupting of a Witneſs as ſuch.

It depends rather on the Nature of the Offence, than on the Puniſhment which was inflicted.

Replevin Bonds.

THESE Bonds, called Replevin Bonds, are given to ſecure Pledges of both Sorts, Pledges to make a Return, and Pledges to Proſecute, and Bonds are now in Lieu of Pledges: Here was Debt on a Replevin Bond brought by the Sheriff; and the Condition was, to appear at the next County-Court, and there to proſecute her Action with Effect, and to make Return of the Goods and Cattle, if Return ſhall be adjudged by Law, and to indemnify the Sheriff for granting the Replevin, and delivering the Cattle.

Replevin Bonds good and allowable in Law, and uſual and Common.

Defendant pleaded that ſhe did appear at the next County-Court, and proſecuted there, and no Return there adjudged.

Plaintiff replies, there was a *Recordari facias loquelam* into this Court, but the Defendant did not proſecute in the Common Pleas, but a Return adjudg'd againſt her, and that ſhe had not returned the Goods. *Per tot' Cur'* this Plea is naught, for it is not enough to proſecute in the County-Court, but ſhe muſt follow it; and if a Return be adjudged in any Court 'tis enough, for the Condition is to go to the End of the Cauſe. *Nichols* verſus *Newman*, *Paſch.* 3 *Geo.* 2. Vide *Carthew* 249. *Chapman* verſus *Butcher*'s Caſe in Point, but not mentioned in Caſe above; and held *per Cur'* to be a lawful Bond, and ſuch is the uſual Courſe now.

The Effect of a Replevin Bond.

Lutwydg verſus *Jameſon*, *Mich.* 4 *Geo.* II. *C. B.*

DEBT on Replevin Bond, and upon *Oyer* the Condition appeared to be, not only to proſecute with Effect, and to make a Return of the Goods, if a Return be adjudged, but alſo to indemnify the Sheriff againſt all Damages, by Reaſon of granting the Replevin. Plea that he performed all the Conditions. *Per Cur'* and Counſel agreed the Plea was naught, for he ſhould plead he did indemnify.

Plea *performavit omnia* ill.

Cur': Judgment *pro Q. Carthew* in Point, 248 and *Vide* 243.

There was another Caſe of *Hayne* verſus *Brigg*, *Mich.* 5 *Geo.* 2. *C. B.* This was an Action on a Replevin Bond, and the Objection made, was, That Pledges ought to be return'd by the Sheriff.

Per Cur': Replevin Bonds held to be good, and are given to ſecure Pledges of both Sorts, as well to proſecute, as to make a Return. The Foundation of this was a *Scire facias* againſt the Defendant, as the late Sheriff, on the Statute of

Replevin Bonds good, their Effect.

Weſtminſter the 2d, for want of taking Pledges on a Replevin.

There was quoted the Caſe of *Nicols* and *Newman*, *Paſch.* 3 *Geo.* 2. *Carthew* 248, 249. *Chapman* verſus *Butcher*, a Caſe in Point held to be a lawful Bond, and the uſual Courſe, *Salk.* 94. There was likewiſe the Caſe of *Lockwood* and *Feak*, in the Common Pleas, that Replevin Bonds are now allowable, and the common Practice.

Replevin Bonds are now aſſignable by 11 *Geo.* 2. *cap.* 19. atteſted under Sheriff's Hand and Seal in Preſence of two credible Witneſſes; and may be done without Stamp, ſo that the Aſſignment be ſtamped before Action brought thereon. Remedy therein by Rule of Court.

DE
Term. Sanct. Hill.

10 *Georgii* I. In the King's Bench.

Plunket and *Gilmore.*

ACTION on the Caſe by a Vintner againſt the Defendant, for procuring a Soldier and others to come into her Houſe, (one of whom was in Woman's Cloths, and pretended to be a Whore) and procuring them and the Mob to cry out a *Bawdyhouſe*, *a Bawdyhouſe*, ſo as to have it to be reputed as ſuch, by which the Mob threw Stones and broke the Windows; and on a Writ of Error out of *Ireland* it was held the Action lay, and Judgment affirmed; for this made the Vintner liable to a Proſecution for a diſorderly Houſe; for, this would be Evidence of it.

1 Mod. Caſes 215. Caſe lies for a ſpecial Kind of Treſpaſs, in making a Tavern be reputed a diſorderly Houſe.

DE

DE
Term. Sanct. Trin.

10 *Georgii* I. In the King's Bench.

Reynolds againſt *Clark.*

1 Mod. Caſes 272. Treſpaſs will not lie, but Caſe, where a Nuſance is occaſioned by an Act in other reſpects lawful.

TRESPASS was brought by the Plaintiff for entring his Court-yard and placing a Spout in that Yard, by Reaſon whereof the Rains came down from the Houſe into the Yard, and hurt the Foundation of the Plaintiff's Stable; by the Defendant's Plea (who juſtified) it appear'd the Plaintiff was Owner of the Yard, but the Defendant had the Uſe of it by Grant from the Plaintiff; the Spout was fix'd to the Defendant's Houſe by the Defendant, when the Rains came, the Water being collected upon the Defendant's Houſe, came down into the Yard in great Quantities, and ſapp'd the Foundation of the Plaintiff's Stable.

It was agreed *per tot' Cur'*, that if this had been an Action on the Caſe as for a Nuſance, the Defendant could not juſtify it, becauſe there was no Spout ſet up before, ſo he can't erect a Nuſance; but *per tot' Cur'*, Judgment for the Defendant; for, Treſpaſs will not lie, but an Action of the Caſe ought to be brought; becauſe what he did was lawful, or at leaſt it did not appear to be unlawful; and this Damage was not the immediate Conſequence of ſetting up that Spout.

Archbiſhop of Armagh and Whaley againſt *The King.*

IN a *Quare Impedit* brought by the King in *Ireland*, on a Writ of Error to the King's Bench in *England*, Judgment was given for the King; a Writ of Error in Parliament was brought, Teſted the Fourth of *May*, in the Time of King *George* the Firſt, but returnable *Tres Trin.* which was the Eighth of *July*; the King died the Eleventh of *June*, ſo it was not returnable in that King's Time. By the Houſe of Lords, and ſeven Judges (whoſe Opinions were aſked) this Writ was abated; becauſe the King himſelf was a Party Plaintiff, and dead, and yet Judgment given for the preſent King; and it was held it was not within any of the Savings of the Stat. 1 *Annæ ſect.* 1. *cap.* 8. or Stat. *Ed.* 6. the Intention was only, that the Subject ſhould not be hurt by the Demiſe of the Crown, and therefore no Original Writ ſhould abate by the King's death between Party and Party; but if the Plaintiff died the Suit muſt abate; tho' the Caſe of *The King* and *Ayre*, *Hill.* 3 of *George*, was cited, which was a *Scire Facias* to repeal a Patent for keeping a Fair; but there it was returnable before the Death of the King.

By the Death of the King a Writ of Error in Parliament abated; the King being a Party, and the Return falling within the Reign of the Succeſſor.

The Reaſon.

Not within Stat. 1 *Anne*, c. 8. nor Stat. *Ed.* 6.

Caſes L. E. 258, 354.

It was agreed that a *Scire Facias* was not a Writ Original but Judicial.

DE
Term. Paſch.

9 *Gulielmi* III. In the King's Bench.

POOR.

The Inhabitants of Walton and *Cheſterfield.*

Reſidence for Education does not gain a Settlement.
Carthew 400. S. C. Skin. 671. S. C. 2 Salk. 479. S. C.

SIR *Paul Jenniſon* had a Boy which ſerv'd him a Year or more, and after for his Preferment, he puts him to a Barber in another Pariſh to learn to ſhave and buckle a Wig, and gave him a Sum of Money, and the Barber was to maintain him for a Year; there he ſtaid for a Year, and learnt accordingly; *per Cur'*, this is neither a hired Servant nor an Apprentice; the Order was quaſh'd, for, the Contract is between Sir *Paul Jenniſon* and the Barber, and no Contract of the Servant, nor was he bound to ſerve the Year out, nor does the Maſter undertake he ſhall ſerve the Year out, ſo no Obligation at all on the Boy, nor on the Maſter on his Behalf; and if the Boy went away, his Maſter could not fetch him back again, for it was no hiring, becauſe the Boy did not conſent, he was no Apprentice becauſe not bound to ſerve.

DE
Term. Sanct. Mich.

12 *Gulielmi* III. In the King's Bench.

The King and *Inhabitants of Audly.*

THIS was an Order of Seſſions mov'd to be confirmed, which was expreſſed to be for Pariſh Levies; and it order'd a Rate in 1665 to be a ſtanding Rate for the future, and to be confirm'd; and another Rate to be quaſh'd.

Pariſh Levies made in 1665; can't be made a ſtanding Rate for the Poor. 2 Salk. 526. S. C.

1*ſt* Exception, 'Tis not an Appeal of the Inhabitants, but of one particular Perſon; ſo the Rate ſhould not be quaſh'd, but alter'd only, and the Perſon reliev'd.

2*d* Exception, It is ſaid for Pariſh Levies, which might be a publick Tax or Church Rates.

3*d* Exception, The Court can't confirm a Rate that was made in 1665 to be a ſtanding Rate; to confirm an old Rate is wrong, for it ought to laſt but for that Year.

Per Holt, This is againſt Reaſon, we can't confirm an old Rate, whole Aſſeſſments may be quaſh'd where made on wrong Ground, then every one is aggriev'd; and if one can't be reliev'd without altering the whole Rate, the Rate may be quaſh'd. Order quaſh'd *per Cur'*.

Cited *Hill.* 4 *W. & M.* The Caſe of the Pariſh of *Newbury*, the Order was, Henceforth the Pariſh is to go by ſuch a Rate; it was held that it ſhould extend only to that preſent Rate. *Mich.* 12 *W.* 3.

DE
Term. Sanct. Trin.
8 *Georgii* I. In the King's Bench.

The Inhabitants of Weſt Hertley and *Eaſt Clendon.*

Fraud apparent not ſuffered to prevent the gaining a Settlement by Service.

A Servant hired for a whole Year, but two Days before the End of the Year his Maſter ſaid he ſhould ſerve no longer, tho' the Servant inſiſted he would ſtay out his Year, yet his Maſter forced him to take his Wages, and to go, and ſaid he ſhould not gain a Settlement, and the Pariſh was uneaſy.

Per Cur', Quaſh the Order, for 'tis Fraud apparent in the Maſter who can't hinder his Servant from gaining a Settlement, when lawfully hired.

DE
Term. Sanct. Trin.

1 *Georgii* I. In the King's Bench.

The Inhabitants of Hanway and *Mauton.*

Where the Settlement of the Wife or Mother, or by Birth, ſhall take place.

SALKELD quoted the Caſe of *Dunsfold* and *Weſtborough-Green*; there the Father's Settlement could not be known, and therefore the poor Perſon was ſent to the Place of the Mother's laſt legal Settlement.

Where a Woman has a Settlement, and marries, her Settlement is gone and ſuſpended, at leaſt if her Husband has a Settlement, but if he has none, then ſhe retains that of her own. *Trin. 6 Annæ*, *Inhabitants of Steventon* and *Marton*, the Man went for a Soldier, Wife and Child found in Vagrancy; held that Birth in caſe of Vagrancy makes a Settlement of the Child, and was ſent to the Place of its Birth, and Order confirm'd; Baſtard is ſettled at Place of Birth on the ſame Reaſon, becauſe he has no Father. 2 *Bulſt.* 351.

Chief Juſtice *Parker*: The Child here has neither Father nor Mother, and nothing here appears to defeat the Mother's Settlement, for here is no Settlement of the Husband appears. Nurſe-Children muſt be maintained by Pariſh where they are ſettled; but here the Queſtion is, how far the Mother's Settlement ſhall be the Childrens Settlement. A Child has a Settlement by Birth no otherwiſe than as it goes with the Father; if the Father die before ever the Child comes to live with him, I don't know whether that has ever been ſettled. If a *Scotsman* marry a Wife, and a Child is born, the Child is ſettled with the Father, and the Wife has no Power over the Child, and as long as the Husband continues there they can-

not ſend her away, for he is the Head of the Family. Order was affirm'd as to Mother and quaſh'd as to Children, that the Mother was to be ſettled where ſhe was born, and the Children where they were born.

Inhabitants of St. Katherine and *St. George.*

Whether the Settlement of the Father is the Settlement of the Children.

THE Caſe was, *A.* the Husband has a Settlement in *B.* and dies, and after the Wife gains a Settlement in *C.* whether the Children ſhall go to the Place of Father or Mother's Settlement.

Nott: If Children under ſeven Years, muſt go to the Mother, and ought not to be remov'd where Father is; *Comner* and *Milton* held ſo on Debate.

Bowneck: She has gain'd a Settlement for herſelf, but not for her Children. *Mich.* 10 *W.* Order to remove a Man and his Family, quaſh'd for the Uncertainty of the Word *Family*, what that really imported; Children gain a Settlement as part of the Family, and have a Settlement wherever the Father is ſettled, the Dependent muſt follow; but if a Widow marry an Husband, her Children can gain no Settlement by Reaſon of the Husband's being ſettled; here is a Settlement of the Father, and why ſhould they be ſettled where the Mother is; they can't be unſettled by the Act of the Mother.

The Mother in her Widowhood may gain a Settlement for the Children under ſeven Years of Age.

Chief Juſtice *Parker:* There is no Difference between the Father's Settlement and the Mother's, they are as much the Mother's Children as the Father's, the Reaſon is equal to be ſettled where the Mother is, as where the Father is; when a Woman marries, her Husband is the Head of the Family, but as long as ſhe is a Widow ſhe is the Head of the Family, and whilſt ſhe is a Widow ſhe is bound to maintain her Child as much as a Father, Nature requires it; it is as unnatural to force a Child from the Mother as from the Father; ſo that if ſhe gains a Settlement, her Children muſt too; ſo *Per Cur'*, the Order was quaſh'd.

DE
Term. Sanct. Hill.

11 *Annæ.* In the Queen's Bench.

Inhabitants of Doulting and *Stoke-Lane.*

CHief Juſtice *Parker* giving Reſolution of Court.

The Difficulty ariſes on 13 & 14 *Car.* 2. *cap.* 12. *ſect.* 21, 22. *Stat.* 13 & 14 *Car.* 2. *ch.* 12. extends to all the Counties in *England* and *Wales*, *viz.* as to appointing Overſeers of the Poor in Townſhips where Pariſhes are too large.

1*ſt* Queſtion is, Whether this Act be general and extends to all the Counties of *England.* I think it is a Miſtake to ſay that Clauſe extends to no other Counties than thoſe named, becauſe the Words are expreſs; for beſides the Counties there particularly nam'd, it goes on and ſays, and many other Counties in *England* and *Wales*; ſo *Wales* muſt be excluded if it be to be confin'd to the Counties nam'd, ſo it muſt extend to all Counties.

2*d* Queſtion, If it be general, then whether it be confin'd to Towns and Villages, or may extend to all Extraparochial Places that are not ſo. It is recited indeed, that by Reaſon of the Largeneſs of the Pariſhes in thoſe Counties nam'd and others, the Benefit of 43 *Eliz.* could not be had; but it does not ſay, that thoſe Towns and Villages muſt be in Pariſhes; but that the Poor within every Townſhip or Village within the Counties aforeſaid, ſhall be provided for within the Townſhip and Village wherein he inhabits, or wherein he was laſt lawfully ſettled; which ſhews it extends to all the Towns and Villages in any Coun-

Extraparochial Places (if Towns or Vills) ſeem to be within it.

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ty, if they can't reap the Benefit of 43 *Eliz.* Therefore Extraparochial Places, tho' perhaps not within the direct View of the Legiſlators, yet are within the expreſs Words; the Poor in every Town and Village. And the Juſtices may in Towns and Villages execute all the Power in Towns and Villages, as they have within any Pariſh or Pariſhes, by 43 *Eliz.* the Conſequence of which is, they may be ſettled in theſe Places, and may be removed from them; and tho' there were no Officers before, yet by this Clauſe the Juſtices may appoint ſtanding Overſeers in theſe Places, to take care of the Poor.

But not if they be not Towns or Vills.

However this Order of Seſſions is naught, becauſe this is not within a Town or Village, and therefore tho' Extraparochial Towns and Vills are within this Law, yet not other Places which are neither Town nor Vill. If it were ſaid at *Brewcomb's Lodge* generally, and no more, that might be intended a Vill; but this is ſaid to be a certain Extraparochial Place call'd *Brewcomb's Lodge*; ſo that this may be but one Houſe, for it muſt conſiſt of ſeveral Houſes and Inhabitants; ſo that it not appearing to be any more than one ſingle Houſe, it is not within the Act of Parliament, and ſo the Order ought to be quaſh'd.

In ſuch Caſe a Man muſt be ſent to his laſt legal Settlement.

The laſt legal Settlement muſt be expounded, ſuch Settlement as can be by this Act, *&c.* it is of Conſequence whether he can be ſent back to this Extraparochial Place; ſuppoſe one go and live as a Servant in an Extraparochial Place, being neither Town nor Village, would this diſcharge him of all other Settlements? As he ſhall not ſtay where he is not ſettled, ſo he muſt go where he is laſt legally ſettled where he could be ſent; laſt is laſt in Law, and an Extraparochial Place is the ſame as if it were in *Ireland.*

The King and *The Inhabitants of Feverſham and Graveny. Paſch.* 7 *Geo.* I.

A Maid was hired for a Year to a Maſter, and ſerv'd for a Year, the Houſe ſtood in two Pariſhes, the Maſter lay in the Pariſh of *A.* and all the Service was done to the Maſter in *A.* but the Maid lay in the Pariſh of *B.* in the ſame Houſe; the Court refer'd it to the Judge of the Aſſize (which was Judge *Eyre)* and he confer'd with two other Judges, and all three were of Opinion that ſhe was ſettled in *B.* where the Maid Servant lay. Servant gains Settlement in Pariſh where he lies.

The *Saxons* uſed, when a Perſon lodged only one Night in any Place, to call him Un-cuþ, *Uncuth*, *i. e.* unknown in *Engliſh*; if he lodg'd two Nights in one Place, he was called Gerr, *i. e.* in *Engliſh*, Gueſt; if three Nights, he was then call'd in *Saxon* Ägenhine, *i. e. Servus* or *Familiaris.*

DE
Term. Sanct. Trin.

4 *Georgii* I. In the King's Bench.

George verſus *Powel.*

INdebitatus Aſſumpſit for Money lent and receiv'd to his Uſe, and on *Inſimul Computaſſet*; the Defendant pleaded that the Plaintiff was an Alien born in *France* under the Obedience of *Lewis* XIV. King of *France*, and an Enemy to the King of *England*, and that his Parents were born under the ſame Obedience, Plea of Alien Enemy, how to be pleaded when in Abatement of the Writ, and when in Bar.

dience, and not under the Obedience of the King of *England*; and that he was at the Time of the Bill, and is now under Obedience of the King of *France*, an Enemy to the King; it was replied, that the Plaintiff was at the Time of the Promiſes, and now remains in this Kingdom, by Licence and Protection of the King, *viz. apud* ſuch a Place, to which there is a Demurrer; and thereupon Judgment for the Plaintiff.

Per Cur', This is a good Replication. Where the Plea is in Abatement to the Writ, and concerns the Perſon, then it is to be tried where the Writ is brought, and if pleaded an Alien Enemy in ſuch Caſe, it muſt conclude to the Country; but if Alien Enemy be pleaded in Bar, the Plaintiff is to reply that he was *Indigena* at ſuch a Place in *England*, *& hoc parat' eſt verificare*; this reconciles the Difference in the Books which ſeem to differ about this Plea. There was a Plea of an Alien Enemy to a *Scire Facias* on a Judgment in Aſſiſe, and held no good Plea after a Judgment of Recovery in Freehold, but to the Original Action it would be a good Plea.

Dr. Sherlock againſt *The Dean and Chapter of Norwich.*

A Grant of the Crown which was void at Law, made effectual by an Act of Parliament, which amounts alſo by Implication to a Diſpenſation with the Statutes againſt Pluralities, and the local Statutes of a Dean and Chapter.

QUEEN *Anne* by her Letters Patent makes Dr. *Sherlock* (being then Maſter of St. *Katherine's Hall* in *Cambridge*) and his Succeſſors (Maſters) a Corporation; and makes them Perſons capable of having and poſſeſſing the firſt Prebend in the Cathedral Church of *Norwich* which ſhould fall, or be vacant, and be in the Queen's Gift; and for the better Support of the ſaid *Thomas Sherlock* Maſter and his Succeſſors Maſters, her Majeſty grants to the ſaid *Thomas Sherlock* Maſter, and to his Succeſſors Maſters, ſuch Prebend, to hold to the ſaid *Thomas Sherlock* Maſter, and to his Succeſſors Maſters, as long as he or they ſhall continue Maſter and Maſters; and grants that the ſaid Prebend be united to the ſaid Maſter and Succeſſors Maſters for ever, requiring the Dean and Chapter of *Norwich* to give to the Maſter and

to his Succeſſors Maſters a Stall in the Quire, and a Voice in the Chapter, as uſual. Theſe Letters Patent are confirm'd by Act of Parliament, and all the Clauſes therein; and enacted, That ſuch Prebend ſhould be united, and ſhould be held and enjoy'd according to the true Meaning of the Letters Patent; it was held that Dr. *Sherlock*, notwithſtanding the Statutes of this Cathedral Church, and that Dr. *Sherlock* was then Dean of St. *Paul*'s, ſhould hold this Prebend, without any other Qualification than as Maſter of *Katherine-Hall*; tho' the Statute of King *James* 1. (King *Edward* 6. being the Founder) ſays, That none ſhall be capable of a Prebend in this Church, who ſhould be a Dean or Prebendary of any other Collegiate Church, as Dr. *Sherlock* then was; all which appeared on a Return to a *Mandamus*, directed to Dr. *Prideaux*, Dean of *Norwich*.

Per Cur': It was the Right of the Crown to nominate, and if the Crown had reſtrain'd its ſelf to Qualifications by the Statute, if it went no further, it would be a good Return; then the Queen unites this Prebend, which is an Execution of her Power of Nomination; but ſhe having only Power of Nomination, and her Power being bound by the Statutes, ſhe can't admit any but ſuch as have the Qualifications by ſuch Laws, and the Dean and Chapter are not bound to admit any other; but the Act of Parliament makes all good; all the Clauſes in the Letters Patent are enacted as much as if they were Part of the Act, and it does not appear the Words intended any other Qualification but being Maſter; ſo a peremptory *Mandamus* went. *Hill.* 5 *Geo.* 1.

Where the Intereſt of a Prebendary cannot be bound by a Majority of the Dean and Chapter.

By the Lord Chancellor, What is peculiar to Prebendaries is, that in all other Bodies aggregate the Intereſt is fixed in the whole Body, and the Majority will bind; but in Caſe of Prebendaries every one of them is a Corps of himſelf, and unleſs he conſent as to the Intereſt belonging to that Corps, as a Houſe or Garden, the Dean and Chapter can't take it from him. The Caſe of the Dean and Chapter of *Weſtminſter* is a Caſe concerning the Dormitory newly to be erected.

DE
Term. Sanct. Hill.

7 *Gulielmi* III. In the Common Bench.

Monnington and *Davis*.

Reſolution of the Court.

An Attempt to conſtrue a Will of Lands containing Clauſes which ſeem to be repugnant.

Blencow J. THIS is a ſpecial Verdict, the Jury finds that *R. M.* was ſeiſed in Fee and made his Will, and deviſes the Lands in the Declaration, which lie, as he ſays, in four particular Vills, to his Wife for Life in full of Dower; then to *R.* his eldeſt Son, his Heirs and Aſſigns for ever; and then diſpoſes of ſeveral Leaſes (which don't appear what they are in particular, either for Life or Years,) and then he goes on and ſays, *all the reſt of my Freehold Lands and Tenements I give to my Son and his Heirs for ever*; then as to his Copyhold Lands, he ſays what is become of them; *if my Son and Daughter*, ſays he, *die before Twenty-one, and leave no Heirs of their Bodies, then all my Freehold Lands not diſpoſed of hereby, nor ſettled by ſuch a Deed, I give to my Wife and her Heirs for ever.* The Jury finds the Death of the Teſtator, the Death of the Wife and the Death of the Son and Daughter without Iſſue before Twenty-one. So that the Queſtion is between the Heirs of the Wife and the Heirs of the Son and Daughter; then Jury finds that the Lands deviſed by the firſt Clauſe, are the ſame with the Lands deviſed in the laſt Clauſe, which is a Contradiction, and ill finding. So that here are ſeveral Parcels of Land; firſt, *To my Wife for Life, and then to my eldeſt Son and his Heirs for ever*; ſecond Clauſe is, *All the reſt of my Freehold Lands I give to my Son and his Heirs for ever*; third Clauſe is as to another Parcel, *If my Son and Daughter die*, as before, then,

then *all my Freehold Lands not hereby diſpoſed nor ſettled, ſhall go to my Wife in Fee*; none of the Lands in Queſtion are thoſe in the Deed.

I am of Opinion this Reverſion ſhall go to the Heir at Law, and that it is no Executory Deviſe to the Wife and her Heirs.

It is inſiſted, that this latter Clauſe ſhall qualify the firſt, but I think not; 'tis more natural to refer it to the ſecond Clauſe in the Will than to the firſt, becauſe the Wife in the ſecond Clauſe has the Lands on a Contingency, and in the firſt ſhe has them abſolutely for Life; that the Lands in the Declaration ſhould be the ſame with thoſe in the firſt and ſecond Clauſe is impoſſible; and the Jury have not found that there were no other Lands than thoſe in the firſt Deviſe. Here appear ſeveral Parcels of Land, firſt to his Wife for Life, then to his eldeſt Son in Fee; ſecond, all the reſt and reſidue of his Freehold Lands to his Son in Fee, if this be a Diſpoſition, he has actually diſpoſed of all, if no Diſpoſition, yet it is a Declaration that the Lands ſhall deſcend and go (he being the eldeſt Son) by Common Law to the eldeſt Son in Fee, ſo are cautionary Words in caſe he ſhould omit any Lands; ſo that the third Clauſe muſt refer to the ſecond, and not to the firſt, all my Freehold Lands not hereby diſpoſed of, and if the firſt be no Diſpoſition becauſe the Lands deſcend, and only a Declaration of his Mind, then theſe Words will relate to the ſecond Clauſe, and then his Meaning is, that what he had left to deſcend he gave to his Wife, and if it was a Diſpoſition, then all was given away before, and if it may be refer'd to the ſecond Clauſe, it is not neceſſary to limit the firſt Parcel. Beſides that, he only ſays, *That the reſt of his Lands, Meſſuages, &c.* he deviſes; but does not ſay, the reſt of his Eſtate; ſo that I am of Opinion this is no Executory Deviſe to the Wife, but that theſe Lands ought to go to the Heir at Law.

Powell J. I am of the contrary Opinion. Powell J.

Objection is, there may be other Lands undiſpoſed of, and here is no finding that there are no other Lands; the Verdict muſt be taken favourably, becauſe it is the Saying of the Lay Gents. It is a Contradiction, they ſay, that the Lands diſpoſed of ſhould be the ſame with the Lands undiſpoſed of; but that will reſt on the Conſtruction of the Will, and that will be the Queſtion, Whether the Lands expreſsly limited and ſo diſpoſed of by the firſt Clauſe, ſhall be taken to be the ſame mention'd to be undiſpoſed of in this laſt Clauſe; this ſounds harſh, but this finding is purſuant to the Words of the Will; it is not neceſſary to find that there are no other Lands, becauſe by his Will he has diſpoſed of all.

We muſt find out the Meaning of the Teſtator as well as we can.

It is not ſuch a Diſpoſition in the firſt Clauſe, to his Son and his Heirs, but it may be qualified by ſubſequent Words, to ſhew what Heirs, tho' in another Part of the Will: and he may explain himſelf in any Part of it, either to make it an Eſtate-Tail or an Executory Deviſe, as he thinks fit.

Suppoſe the Words [not diſpoſed of] were left out, it would have been well enough; for on a common Poſſibility the Lands might be limited over. But it is ſaid, here is neither Land nor Eſtate undiſpoſed of, for he had diſpoſed of all before; it is true, he had in Words, and he knew it; but he muſt mean ſomething by theſe Words *all his Lands undiſpoſed of*; and if we can put any Meaning upon this Clauſe, rather than reject a whole Clauſe, we will do it.

Then it is ſaid, he might make ſuch a Proviſion in caſe his Son and Daughter die, and as to Lands he might have forgot; that could not be, becauſe there were general Words before, by which he had diſpoſed of all; and then it is ſaid this muſt refer to the ſecond Clauſe, but by this Conſtruction of Law the Son muſt take by Deſcent and not by the Will. The Queſtion is, What the Teſtator meant by theſe Words? When a Man has diſpoſed of all in expreſs Terms,

could he intend or mean that they ſhould deſcend to his Heir? And he thought he had diſpoſed of all; and when he talks of Lands undiſpoſed, he took this to be a Diſpoſition.

Cuſtomary Lands are oftentimes called Freehold, and is where there is a Cuſtom to paſs Freehold Lands by Surrender, and yet may not be Copyhold, but deviſeable, and ſuch as want no Livery.

What he meant by the Words, *Lands not hereby diſpoſed of*, are thoſe Lands which were limited to Son and Daughter on that Contingency, the Deviſe was Lands and Eſtate not diſpoſed, that I take to be his Meaning. Of Inheritance over on the Contingency.

Yel. 209. *Cro. Jac.* 290. are this Caſe; ſo is 34 *H.* 6. 6. They held that the Lands in the Tenants Hands for Lives would paſs, and did reject Teſtator's own Words, the Lands in his own Hands, where he had no Lands at all in his own Hands. This is to be eſteem'd only a ſecond Diſpoſal of his Lands on this Contingency.

Nevil J. Of the ſame Opinion, and quoted *Allen* 28. Nevil J.

Treby Ch. J. Every Will ſtands on its own Bottom and is various as any Thing whatſoever, and therefore it is hard to cite a Caſe that can quadrate. I have mean Thoughts of my own Opinion. I may ſay in this Caſe, *difficilius eſt invenire quam vincere*, as *Cæſar* ſaid when he and his Army ran about the *Alps* to find out a Way. Treby Ch. J.

The Caſe is, *A.* ſeiſed of *B. C. D.* and *E.* deviſes theſe by Name to his Wife for Life, and then to *R.* his Son, having only a Son and a Daughter, and his Heirs for ever. The Jury find the Lands deviſed by the firſt Clauſe, and the Reſidue deviſed by the ſecond, are the ſame Lands, which ſeems to be a Contradiction; but we muſt excuſe the Lay Gents, but their Meaning was, that the Teſtator had no other Lands than theſe four Acres. Then, ſuppoſing a Man has only four Acres, the ſecond Clauſe is quite out of Doors; and then we come to the third Clauſe, and as to that I think

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it is no Doubt, but theſe latter Words turn the Eſtate in the firſt Clauſe into an Eſtate-Tail to the Son and Daughter, and the Remainder in Fee to his Wife; this is an allowable Limitation by way of Executory Deviſe, being determinable on ſo ſmall a Number of Years.

It is ſaid theſe Lands are Copyhold, I think they are neither Copyhold nor Freehold, for there is a third ſort of Lands which are Cuſtomaryhold, they paſs by Surrender as if they were Copyhold, but Copyhold Lands are always at the Will of the Lord, but Cuſtomary Lands are not. In the Northern parts of *England* there is very much of this kind of Cuſtomary Lands, which they only enter in the Lord's Book, and that is the Conveyance.

In Stat. 4 *Jac.* 1. *ca.* it is ſaid there are three ſorts, Freehold, Copyhold and Cuſtomary Lands, ſo that it cannot have relation to Freehold Lands. As to the ſecond Clauſe, that muſt be only by way of Caution, that if he had omitted or had any other Lands. So that we cannot underſtand this latter Clauſe of the Land itſelf, becauſe there was none left, but of the Eſtate in the Land, tho' not mention'd in the Will; his Meaning appears, tho' imperfect. A whole Clauſe in a Will is not to be rejected, if any Meaning can poſſibly be put upon it, as the Caſe in *Yelv.* is, which is a Caſe founded on good Reaſon; theſe Words [not hereby diſpoſed of] muſt not be void, if they can have any Meaning; he had an improper Conception of the Diſpoſal of Lands, that is all that can be ſaid.

A Clauſe in a Will, not to be rejected if capable of any Meaning.

This is the Abſurdity they ſay, if Son and Daughter die without Iſſue, even then the Wife is to have but an Eſtate for Life by the firſt Clauſe, why then is ſhe to have all by the laſt Clauſe; this is the Violence, yet that muſt be done rather than leave out a Clauſe.

Now when this Fee comes, it will drown the Eſtate for Life by Operation of Law, which perhaps he knew nothing of.

The Queſtion is, Whether the Words *Lands and Tenements* will carry a Reverſionary Eſtate, or a Poſſibility after an Eſtate-Tail? I think it will, 34 *H.* 6. 67. Held there that *Lands and Tenements* will carry a Reverſion, tho' ſaid to be in his own Hands, and yet he had nothing but the Rents and Services, and the King's Hands might be amov'd as well from a Reverſion as a Poſſeſſion. That Caſe of *Allen* is clear, the Reverſion did paſs by the Words, *all my Lands after ſix Years*, which Term he had deviſed away before. *Moor* 873. *Hob.* 2. That Caſe comes pretty near this, where there was a Term deviſed for 99 Years to his Wife, and then ſays, I give her all my Lands of Inheritance, if the Law permit; in Strictneſs the Words go to the Land, and not to the Eſtate in the Land, yet they conſtrued it the Eſtate in the Land; and this is the ſtronger, becauſe the Eſtate for Years and the Inheritance were by this conſolidated, and the Eſtate for Years drown'd. But 2 *Vent.* 285. is a direct Authority. The Will creates an Eſtate for Life, and they held by the Words, *Lands undiſpoſed of*, the Reverſion paſſed, tho' no Word of a Reverſion was mention'd, or of Eſtate in the Land, ſo that the Words, *all his Meſſuages and Lands*, did not ſignify the Land itſelf but the Eſtate in the Land. So that this Caſe is ſupported by ſeveral others, and in Point of Reaſon. We are to ſpell out Mens Minds by Hints in the Will, as my Lord *Hale* uſed to ſay.

Lands and Tenements will carry a Reverſion.

If the Verdict be altogether inſenſible, then there muſt be a *Venire facias de Novo.*

If a Verdict be inſenſible, there muſt be a *Venire facias de Novo.*

But here is nothing left undiſpoſed of but the Reverſion, and therefore I think that paſſes.

Note; In the Caſe in *Vent.* they held that the Words *Meſſuages, Lands, Tenements and Hereditaments*, would carry the Reverſion of the Houſe as an Hereditament undiſpoſed of.

ADMIRALTY.

Anonymus.

Maſter of Ship prohibited to ſue the Part-Owners in the Admiralty for Seamens Wages which he had paid.

MOVED for a Prohibition, on a Suit in the Admiralty by a Maſter of a Ship againſt the Part-Owners for Seamens Wages, he having paid off the Seamen and would now ſtand in their Places; and *per Cur'*, it was granted, for when the Maſter has paid the Seamen and they are diſcharged, there is an End of that Privilege and Indulgence to Seamen, which is perſonal, and can't be transferr'd.

Smith verſus *Crosby.*

Prohibition denied to a Seaman's Suit in the Admiralty for Wages upon a Contract with a Freighter, it need not be *ſuper altum mare.*

SUIT in the Admiralty Court by a Seaman for his Wages by one only, and the Libel was, *inter fluxum & refluxum maris infra Juriſdiction' Admiral'.* And it appeared by the Charter-Party that the Contract was made with, and the Seamen hired by a Merchant, one of the Freighters, and not by the Owners. It was urged the Libel ought to be *ſuper altum mare*; but *per* Chief Juſtice, in this Caſe it need not be ſo, becauſe in the Caſe of Wages they may ſue in the Admiralty, tho' the Contract be not on the High Sea; and if the Queſtion be on the Payment of Wages, that is proper in the Admiralty Court.

The Court denied a Prohibition, as did the Court of Common Pleas before. Chief Juſtice *Trevor* ſaid Seamen had a double Remedy, againſt the Owners or Maſter, and againſt the Ship; and this was a Libel both againſt the Perſon and againſt the Ship; but it was obſerved *per* Serjeant *Pratt*, that the Ship was liable only by Reaſon of the Perſon's being liable, which is by the Contract.

Creed and *Mallet.*

Per Holt Ch. J. SHIP Carpenter, tho' a Warrant Officer, yet held to be within the Act 2 *Annæ*, for diſcharging liſted Soldiers and Mariners; *per Holt & Cur'*, if any Officers join with common Mariners they can't ſue in ſuch Manner in the Admiralty Court for Wages; but *econtra* of a Ship Carpenter; he was not arreſted, nor need be ſo.

Ship Carpenter within Stat. 2 *Annæ* for diſcharging Mariners.

Edmonton and *Franklyn.*

LIBEL for Seamens Wages in Court of Admiralty, and at the ſame Time, they ſued for their Wages at Law, and Iſſue was joined on ſuch Action, and moved for a Prohibition to the Admiralty Court; and *per Cur'*, you ought firſt to plead this Suit in the Court of Admiralty, and if they refuſe the Plea, it will be proper to move for a Prohibition.

Suits for Seamens Wages in the Admiralty and at Common Law, how Prohibition to be obtained.

Per 4 & 5 *Annæ*, Seamens Wages to be ſued for within ſix Years in the Court of Admiralty, and not after.

Seaton and *Thwaits.*

Whitaker: MOVED to amend a Declaration, in an Action upon the Cuſtom of *England* for negligently keeping their Fires, whereby, *&c.* it was laid to be at the Pariſh of St. *Martins*, ſo the *Venue* was wrong, and they would have it amended to the Pariſh of St. *Clement*'s; and this was after Iſſue joined and Record of *Niſi prius* made up, and made a *Remanet*; but being all in Paper, *per Cur'*, it may be amended on Payment of Coſts, or the Plaintiff may give an Imparlance at his Election, and muſt give Rules to plead, but the Defendant has Liberty to plead *De novo.* Chief Juſtice: In the Caſe here about the Grogram

Amendment on Payment of Coſts of the *Venue* in a Declaration in Caſe for negligently keeping his Fire, after Iſſue joined, *&c.* N. B. This Action is taken away by Stat. 10 *Annæ*, c. 14. Defendant may plead *De novo.*

Grogram Yarn, we refuſed to amend there, becauſe that was an Information *qui tam* on the Statute of Uſury, and the Amendment would have made it another Action, and another Perſon might have intitled himſelf by an Action brought by him, it being a popular Action; but as to its being Subſtance, or a material Amendment, that is always ſo, for if it were not material, they need not amend at all; and tho' it ſhould make it a different Action, that is not material here.

Queen and *Norton.*

Amendment of Information on Statute of Uſury, refuſed becauſe a popular Action.

THIS was an Information *qui tam* brought by an Informer, on the Statute of Uſury, and moved to amend, by altering the Pledge the Money was lent upon; for it was laid in the Declaration, that a Quantity of Grogram Yarn was delivered to the Defendant as a Pledge to lend 200 *l.* upon, and that the Defendant was to receive a Guinea a Month for Intereſt; and by this Amendment they would have ſtruck out all that relates to the Pledge of Grogram Yarn; but the Court refuſed it; becauſe it makes it another Information, and another Perſon might be intitled, it being a popular Action; but agreed *per Cur'*, that it is a general Rule to amend Informations at any Time, even juſt before Trial, but then it muſt not make the Information different; but the Court ſent it to the Maſter, to examine if the Informer ſet up was not a *Pauper*, that he might anſwer Coſts to the Defendant.

DE
Term. Sanct. Hill.

11 *Gulielmi* III. In the King's Bench.

Horn and *Lewins.*

In Replevin, Conuſance. Salk. 583. Caſes B. R. 352.

DEfendant made Conuſance as Bailiff; that *S.* was ſeiſed in Fee, and granted to *P.* 100 *l.* Rent-charge Annually, with Clauſe of Diſtreſs, and for 100 *l.* Rent in arrear Defendant did diſtrain, and ſo makes Conuſance as Bailiff.

Plea *De injuria ſua propria* in Bar of Conuſance for Diſtreſs, whether to conclude to the Country.

Plaintiff pleads in Bar of the Conuſance, and ſplits the 100 *l.* and ſays, as to 50 *l.* Part, the Defendant did it *De injur' ſua propr' abſq; hoc quod fuit* in arrear, *Et hoc parat' eſt verificare, &c.* and does not conclude to the Country; to which there is a Demurrer; and as to the other 50 *l.* pleads he was at the *Locus in quo*, at the moſt notorious Place till Sun ſet, *& parat' fuit* to pay the Rent, and Nobody there to receive it, and brings it into Court.

The Defendant Demurs ſpecially to firſt Plea, becauſe it amounts to the General Iſſue. And as to the other 50 *l.* takes it out of Court, *& pro damn' dic' quod non obtulit*, and Plaintiff Demurs.

Cheſhire *pro Def'*.

Cheſhire pro Def'. Objected, This Plea is nought, it ought to have concluded to the Country, for here is an Affirmative and a Negative.

As to the other 50 *l.* they ought to have ſaid *Quod pet' Judic' de dampnis*; for they can't plead this to the Duty

which they have confeſt; they have paid the Money into Court and it is received; the Plaintiff comes, and ſays, he was ready at the Place, and he comes after and diſtrains, and may make a Diſtreſs without any Demand. 7 *Co.* 28.

Raymond *econtra.* *Raymond econtra:* Where the Matter comes in with an *abſque hoc*, there muſt be an Averment. *Dyer* 253.

Holt Ch. J. *Holt* Chief Juſtice: You ought to have ſome ſpecial Inducement to Traverſe; if it had been in Treſpaſs, and a Juſtification for this, it would have been proper; but in Replevin it is not proper to have a Traverſe where a Man is to pay Rent, and he tenders it at the Day, if Grantee of Rent-charge be not there, the Queſtion is, Whether he can diſtrain afterwards without a Demand made? Tho' the Rent is not loſt by that. *Hob.* 207. But there Rent-ſervice is tendered at the Day on the Land, yet Lord may diſtrain *ſans* perſonal Demand, for the Diſtreſs is a Demand; if lawfully demanded tho' expreſs in the Deed, yet it is no more than what the Law ſays without it.

J. Gould. J. *Gould:* This is no Tender, only a *Paratus*, no *Obtulit*, the Difference is between Rent-ſervice, Rent-charge and Rent-ſeck; in Rent-ſeck you muſt make a Demand, *aliter* is no Diſſeiſin, and if ſo, can bring no Aſſiſe.

Ought to plead *Riens* Arrear directly in Replevin, but not ſo in Treſpaſs.

At another Day, in Trin. Term.

Raymond. *Raymond:* IF you take a material Traverſe it is well enough. 2 *Sand.* 294. *Raſt. Ent.* 557, 558, 630. There is in Treſpaſs a Traverſe of a Licence, and as to this Treſpaſs and Replevin it is the ſame. 5 *H.* 7. *pl.* 2, 3.

Holt Ch. J. *Holt* Chief Juſtice: In Replevin you can't traverſe your being a Bailiff, nor can you traverſe *De injur' ſua propr' ſans*

tali cauſa, abſq; hoc, that he was a Bailiff, for that is traverſing the whole Avowry.

De ſon tort Demeſn is well enough in Treſpaſs, ſo in Replevin that he did diſtrain *De injur' ſua propr', abſq; hoc*, that there was ſuch a Preſcription, is very proper where the Avowry is on a Preſcription. Where Diſtreſs taken, and any one tenders the Rent, if they avow for it, this is a good Plea that he tendered the Rent.

The Queſtion is, Whether this will not abate your Avowry, when the Money is paid into Court, and that appears on the Record? In caſe of an Avowry, where Plea in Bar, to that muſt plead an actual Tender, but here Money is paid into Court, and you have accepted it. Tender in ſuch Caſe, where a good Plea. Money being paid into Court and taken out.

Gould J. This is only *Parat' eſt*, and not an *Obtulit*, and therefore will not do. So is *Hill.* 7 *W.* 3. *ro.* 1657. *C. B.* being ready at Place and Time, without actual Tender, is not enough. 1 *Vent.* 322. In Debt for Rent incur'd every Half Year, pleads was ready at Day and Place; held no Plea without an *Obtulit*. *Moor* 883. Gould J. Not a ſufficient Plea of Tender, without *obtulit*.

Holt Ch. J. To excuſe himſelf from Damage, muſt ſay, was ready always and at all Times, *Cur' Adviſ'*. Holt Ch. J.

Cro' Animar', 12 *W.* III. 1700.

Broderick pro quer': *Objection*, Traverſe not good, and he ſhould have ſaid nothing but *Riens* arrear, and have ſhewn this for Cauſe; but tho' he might go directly to *Riens* arrear, yet it is only going a little about; you may ſay in Court, that Premiſſes were in Repair, *abſq; hoc*, were out of Repair; and tho' no Tender here made, yet *parat'* will do in this Caſe, for the Defendant does come and take the Money out of Court, and accepting it, does diſcharge him proceeding any further for Damages, for he has abated his whole Avowry. 2 *Cro.* 126. 1 *Inſt.* 355. *Keilway* 20. 11 *H.* 7. Bailiff can't without Order take a Diſtreſs. Broderick *pro quer'*,

Diſtreſs. 5 *Co.* 76. Bailiff's Warrant is determined by taking the Diſtreſs, ſo that after the Replevin brought he has no Authority. *Moor* 151. He can't enter for Condition broken. *Dyer* 222. *Hob.* 154. *Latch* 53. *Dyer* 227.

Hall Serjeant *econtra.*

Hall Serjeant *econtra: De injur' ſua prop' abſq; hoc, quod riens arrear*, this was ever ſo pleaded, it is a ſpecial Pleading in Replevin; in Treſpaſs it might be *aliter, De injur' ſua prop' abſq; hoc*, that he was Guilty, this might amount to the General Iſſue. *Mayn. Ed.* 2. 50. *Fitzh. Abr. Saving* 18. 9 *Ed.* 4. 27. *Bro. Fitz. Treſpaſs* 106. 17 *Ed.* 3. 6. Here the Land is the Debtor, and their Caſe of Action of Debt does not come up to this. In Replevin you can't traverſe Bailiff or not Bailiff; to which *Holt* Chief Juſtice agreed.

Holt Ch. J.

Holt Chief Juſtice: After Judgment to have a Return and Damage in Replevin, and Tender of Amends, is not that good? would you keep the Cattle always? as where Rent arrear and Rent tendered after Judgment for a *Ret' Hab'*, is not that good? he ſhall have a Return of the whole Diſtreſs.

Parat' eſt is not a good Plea of Tender.

Per Holt: You ſhould have concluded to the Country, that is the Fault of your Plea; they avow for a whole Year's Rent, and then you divide this into Two, and as to one 50 *l.* you only ſay *Parat'*, now that is not a good Tender.

At another Day, Hill. 12 *W.* III.

Mulco *pro Def'.*

Mulco pro Def'. THE Plaintiff has not aſcertained to which 50 *l.* he pleads this Plea; and in the next Place he ought to have concluded to the Country, and this we have ſhewn for Cauſe in our Demurrer. 2 *Cro.* 126. 2 *Vent.* 323. 3 *Leon.* 239. *Kelway* 74. 2 *Sand.* 338. 3 *Cro.* 91.

Holt Ch. J.

Holt Ch. J. Shew that where a Defendant ſays he was always ready, and brings Money into Court, and prays Judgment *de damn'*, and that the Plaintiff took the Money out

of Court, that he did not agree with the Defendant in the whole Plea.

Holt Ch. J. When any one receives Money out of Court, it is the Judgment of the Court that he be quiet, and he agrees to all Defendant ſays. Judgment may be for Damage in the Caſe of an Ejectment, where the Term expires pending the Writ. Damages are meerly acceſſory, and the Party's Acceptance of the Thing precludes himſelf from having Judgment, and ſhall he here have Damages ? Holt Ch. J. The Effect of taking Money out of Court.

The bare *Parat'* is not enough, and amounts not to a Tender without an *Obtulit*, and *ergo* being ready without Tender, did not oblige Grantee to demand Rent before Diſtreſs, and ſo Diſtreſs lawful, *ſans* Demand. And the *Profert* of Money idle, for it may be *Profert* of Money to ſave Damage where Money is in Demand, but it can't be in Avowry to a Replevin, for if the Plaintiff had pleaded the Tender right, it had been well. *Hob.* ſays, if there be Rent-charge or Rent-ſeck, and Tender is made at Day and Place, Leſſee or Grantee ſhall not diſtrain without a Demand. Where Condition of Bond to pay Money, and plead a Tender, and bring into Court the Sum demanded, that is right; but here bringing Money into Court is Surpluſage; for this is a Replevin of Goods; and here the Queſtion is only whether the Defendant has rightfully diſtrained, or not? If the Cauſe of the Diſtreſs is right and legal, the Defendant ought to have a Return; if not, the Plaintiff ought to have Damages and no Return at all.

You ought to have pleaded an actual Tender at Time and Place; Avowry is to juſtify Taking the Cattle; and whether Money paid or not, is not the Queſtion; but if the Diſtreſs was rightfully taken the Avowant muſt have a Return; and if wrongfully, muſt anſwer Damage, and if *Profert* ſuperfluous, ſo is the Acceptance by Avowant, and not an *Obtulit* only, and that the Party did not come.

Now your Plea is naught, and you have brought Money into Court, and the Bailiff has taken it out, and if your

Plea is naught, your bringing Money into Court is Surpluſage. The Avowry is a good Avowry, tho' the Rent was not demanded, for he may diſtrain without any Demand, ſo that the Avowry being good, it is not anſwered or diſcharged by the Plea.

It is an impertinent round about way of pleading the General Iſſue, and amounts to no more than *Riens* in arrear, and ſo ill on a ſpecial Demurrer.

As to the Plea of *De injur' ſua propr'*, it is the ſame in Effect as *Riens* arrear, and that is the General Iſſue; *Riens* arrear is the proper Plea, and it is a Circumlocution to ſay *De injur' ſua propr'*, and ſhould have pleaded the General Iſſue; it is true, this is but Form, but it is a legal Form, it is pleading a General Iſſue in a ſpecial Manner, but then it is Cauſe of Demurrer, if you ſhew it for Cauſe. So here you might have pleaded generally *Riens* arrear, and conclude to the Country; but when you aver your Plea, it is forcing the Avowant to make a Replication, and put him upon wrong pleading, and delaying the Matter, for which Reaſon the Plea is naught. 2 *Cro.* 756.

So Judgment muſt be for the Avowant for the whole.

Dawſon verſus *Blackwell.*

Southouſe *pro quer'*.

Attorney of *C. B.* pleading his Privilege need not plead the Preſcription.

Southouſe pro quer': PLEA of Privilege by Defendant as an Attorney of Common Pleas, but does not ſet out the Cuſtom, that Time out of Mind Attornies have had Privilege, but only ſet out, that he ought to have Privilege, *juxta conſuetudinem Curiæ de Banco.*

This Objection made, but

The Court will take Notice of it.

So of the Exchequer.

Per Cur' over-ruled, for we muſt take Notice of the Law, and the Practice of every Court is the Law of that Court; the Queſtion is only as to the Fact, if the Defendant be an Attorney or not, and that is the Iſſue; ſo if the Defendant be in Fact an Officer of the Exchequer, we muſt take Notice of the Law that he has privilege, and therefore the Court held Plea good notwithſtanding this Omiſſion.

The Inhabitants of Gaton and *Milwich.*

ONE nominated by the Parſon to be Pariſh-Clerk, by Conſent of Pariſhioners and Inhabitants, came into the Pariſh and lived there eight Years, and had 4 *d. per* Meſſuage and 2 *d. per* Cottage for his Fees, beſides the Profit of Chriſtenings and Burials; and the Queſtion was, Whether this made a Settlement or not? Whether a Pariſh-Clerk gains a Settlement?

Objected this was not an annual Office, becauſe in the Power of the Parſon of the Pariſh to turn him out, and therefore not within the Act of Parliament, or at leaſt the Pariſh may turn him out.

Lechmere: This is more than an Annual Office, for this is a Freehold, and by Conſent of the Inhabitants. A *Mandamus* will lie for a Pariſh-Clerk. 3 *Lev.* 18. The Words of the Act of Parliament are, *Annual Office or Charge*, and the Word *Annual* is not repeated and added to *Charge*, as it is to *Office*; he is to enter and regiſter Births, Marriages and Burials, and receives Fees for it, and it is both a Charge and Office. Being nam'd by the Parſon with Conſent of the Pariſh, and by him appointed Clerk, he has an Office for Life, and is an Officer of the Pariſh, and not of the Parſon. Lechmere.

Powell Juſtice: It is agreed, if the Clerk come in by the Election of the Pariſh, that will be a good Settlement. In this Caſe it muſt be taken that the Parſon has the Nomination of his Clerk; and if the Parſon bring in a poor Man, the Pariſh may remove him, but here the Pariſh has conſented; and this is more than an Annual Officer, and I don't think he is removeable at pleaſure, and he can't be turn'd out but for a Miſdemeanor. Powell J.

Powis Juſtice: This is a good Settlement; this is the moſt notorious Officer in the Pariſh, and not removeable but for a Miſdemeanor. Powis J.

Eyre

Eyre J. *Eyre* Juſtice: I am doubtful whether a Clerk appointed by the Parſon, can be an Officer for Life, for as it is an Office, it lies in Grant. Where a Clerk comes in by Election of Pariſh, that is a Method by Law, and he is choſen in for Life; but here he comes into his Office by the Appointment of a particular Perſon, he muſt be appointed by ſome Inſtrument that muſt give him this Office for Life, becauſe it lies in Grant; I don't think that by a Nomination only any one can diſpoſe of a Freehold. It is not like a Clerk of the Peace, becauſe he comes in by Act of Parliament, which is different; I doubt he is only an Officer at Will, and therefore he can't gain a Settlement tho' he has liv'd never ſo long there; had he been an Officer for Life, no doubt he would be ſettled, being more than an Annual Office. This is alſo different from the Office of Church-Wardens, becauſe when they are appointed by the Pariſh they are Officers for a Year by the Statute. A Conſtable choſen in the Leet without the Conſent of the Pariſh, makes a good Settlement, for by the Law he is in for a Year.

Powell J. *Powell* Juſtice: This is a Cuſtomary way of coming in without any Grant, nor is there need of it, no more than in the Caſe of a Parſon, who is in for Life, only by a Nomination and Appointment without any Grant. This being an Order to remove the Pariſh-Clerk, it was quaſh'd, *per Powell* and *Powis* verſus *Eyre*, abſent Chief Juſtice.

Vide the Order *prout The King* verſus *The Inhabitants of Milwich.*

HABEAS CORPUS.

Anonymus.

Habeas Corpus was awarded for a Man who had been convicted and fined 1000 *l.* at the *Old Baily*, for ſelling broad Money, with an Intent to have it clip'd; the Return

made to the Writ was, that at a Seſſions of *Oyer* and *Terminer* held there, *&c.* the ſaid *W. B.* was committed by the ſaid Court, *occaſione cujuſdam ordinis ejusdem Cur'*, *Tenor' cujus quidem ordinis ſequit'*, *&c.* and in the Order there was no Commitment mentioned; but only ſaid, that he is convicted, and ordered and adjudged that he remain in the Gaol aforeſaid, till he pay the ſaid Fine.

Sir *Bartholomew Shower* took two Exceptions to this Return.

1*ſt*, That here was no Commitment, nor did it appear that he then was, or ever had been in Cuſtody; for it ought to appear how, and ſhew ſome Cauſe why he was in Cuſtody, and if he was in Cuſtody before, he ought to have been charg'd in Execution. Juſtices of *Oyer* and *Terminer* could not take Notice he was in *Newgate*, and if he was not committed when he was in Court, Proceſs ought to iſſue to bring him in; here he muſt be ſuppoſed and intended to be in *Newgate*, when the utmoſt Certainty is required in the Return of a Writ, that is not traverſable.

2*dly*, Tho' a Commitment ſhould be intended, yet it ought to have been to the Sheriff, and not to the Gaoler; for the Court commits judicially in Execution, and the Sheriff is the proper Officer of the Court; and is chargeable with the Priſoners, and is anſwerable, tho' not criminally, for Eſcapes; and the *Ha' Cor'* ought to have been directed to the *Vic'*, and not to the Gaoler.

In Anſwer to this Exception it was ſaid, that it was the Cuſtom of the City not to have any expreſs Commitment, and if they had made ſuch a Return, it would have been a falſe Return; that the Cuſtom was only to deliver ſome few Minutes of the Judgment to the Gaoler, and that is always and only his Warrant; ſo that this is an Objection againſt the Judgment of the Court in this Caſe, which can't be arraign'd on a *Ha' Cor'*.

How the Keeper of *Newgate* ought to mention himſelf in returning an *Habeas Corpus.*

Holt Ch. J. A Commitment to the Keeper of *Newgate* is not good, otherwiſe than as he is Servant to the Sheriff, for it muſt be to the proper Officer; the Keeper of *Newgate* acts only as an Officer to the *Vic'*; and when any one is in *Newgate*, he is in the Cuſtody of the *Vic'*. He ſhould have returned ſpecially, that he was Gaoler to the *Vic'*, and that he was committed to him as ſuch; for *Newgate* is the County Gaol and belongs to the *Vic'*.

When a Priſoner is in Court he may be committed without any Proceſs.

When a Priſoner is in Court he may be committed by the Court without any Proceſs; but if not, Proceſs muſt go. Or if a Man be waiting in *Weſtminſter-Hall*, (which is in View of the Court) againſt whom there is Judgment, the Court may order him to be brought to the Bar, and may commit him by a Tipſtaff, but if elſewhere that can't be done, but Proceſs muſt go.

The Court took Time to conſider of the Return, and in the mean Time the Defendant was bail'd, which they ſaid they could do, while the Matter was in Debate, and could remand him afterwards.

Anonymus. Trin. 12 *W.* III.

Commitment for Misbehaviour is ill, it ought to be for want of Sureties for good Behaviour.

ON Return of *Ha' Cor'* moved to diſcharge Defendant, it appeared on the Return he was committed by five Juſtices of *Surry* for a Miſbehaviour; but it not appearing in the Commitment that he was committed for want of Sureties for the good Behaviour, the Priſoner was diſcharged.

Anonymus, eod. Term'.

Perſons in Execution are frequently bailed while the Return of an *Ha' Cor'* is under the Conſideration of the Court.

ON Return of *Ha' Cor'* committed on *Excom' capiendo*, in a Suit there for teaching School: Chief Juſtice *Holt*, I am not ſatisfied they have Juriſdiction in Eccleſiaſtical Court.

Agreed *per Cur'* they might bail him, while the Matter was in Debate.

Holt ſaid he did bail one *Clerk* at his Chambers, on a Matter relating to the *Vintners* Company, the *Ha' Cor'* being returnable there, while the Matter of the Return was in Debate; and ſaid, we bail a Man in Execution, on an *Audita querela*; but did not bail him in this Caſe, but ordered him to come again next Day.

The King verſus *Fowler, eod. Term'.*

THE Defendant was committed to the Gaoloreſs of *Worceſter*, *Eleoner Hemings*, on *Excom' Capiendo*; and *Ha' Cor'* was directed to the Sheriff or the Gaoler, ſetting forth the Defendant was in Cuſtody of them, or one of them.

To whom an *Habeas Corpus* ought to be directed? Salk. 350.

Holt Chief Juſtice ſaid, that where a Man is committed to the Keeper of the Gaol, then the *Ha' Cor'* muſt be directed to him, but when committed by Proceſs, muſt be directed to the Sheriff; tho' at firſt he ſaid the *Ha' Cor'* ought to be directed to the *Vic'*, and not to the Gaoler.

Holt ſaid, The Writ was in the Disjunctive, and *Ha' Cor'* not well directed, for Disjunctive Writ was no good Writ. It was ſaid, and not denied, that where one is taken by Virtue of Proceſs to the *Vic'* and is in his Cuſtody, he is in by Virtue of the Writ, and no Matter what the Warrant is, and the *Vic'* need not recite the Warrant.

An *Ha' Cor'* ought not to be directed to ſeveral Perſons in the Disjunctive.

Anonymus. Mich. 12 *W.* III.

A Motion was made for the Warden of the *Fleet* to attend, for not returning a *Ha' Cor'*.

Whether Perſons in Cuſtody in *B. R.* be removeable to any other Priſon.

Holt

Holt Chief Juſtice ſaid on this Occaſion, that by Right, one in Cuſtody of the *King's Bench* ought not to be removed to any other Priſon; if this was look'd into, this way of removing Priſoners from the *King's Bench* to the *Fleet* would not be allowed.

Anonymus. Hill. 12 *W.* III.

Procedendo awarded where the Plaintiff removed the Cauſe by *Ha' Cor'* after Notice of Trial.

IT was moved for a *Procedendo*, becauſe the Plaintiff, after he had given Notice of Trial, remov'd the Cauſe of himſelf by *Ha' Cor'*. *Per Holt & Cur'*, Let a *Procedendo* go, not but that a Plaintiff may remove his Cauſe himſelf, but this is meer Vexation to do it ſo late, and a *Procedendo* was awarded, having been done before.

Taylor and *Reynolds. Hill.* 13 *W.* III.

Whether *Ha' Cor' cum cauſa* lies to the Stannary Courts in *Cornwal.*

AN *Ha' Cor' cum cauſa* iſſued to remove a Cauſe out of the Stannary Court in *Cornwal*; and a Return was made of Stat. *Ed.* 1. and 15 *Ed.* 3. that all Tin Cauſes ſhould be tried in the Stannary Court, and that this being a Tin Cauſe, it was exempt from the Juriſdiction of the Court of King's Bench. 1 *R.* 547.

On this Return it was moved to have a *Procedendo*, and quoted *Styles* 255, that on Return of the Cauſe the Court would take Notice of it, and that formerly uſed to grant a *Procedendo* without a ſpecial Return.

The Lord Warden is to come and claim his exempt Juriſdiction.

Holt Chief Juſtice denied that in the Caſe of a *Ha' Cor'*, and ſaid an exempt Juriſdiction was never returned on a *Ha' Cor'*, becauſe you can never traverſe it, and yet the Court is to be ouſt of their Juriſdiction by the Return of a *Ha' Cor'*; the Way is where a *Ha' Cor'* is directed to an exempt Juriſdiction, you are to put in Bail, and my Lord Warden is to come here and claim his Juriſdiction. Exempt Juriſdiction is for the Benefit of the Grantee only, but Conuſance of

Pleas

Pleas is another Thing; the Queſtion is, Whether this Anſwer of exempt Juriſdiction lies in the Mouth of the Party? 9 *H.* 7. 10.

Let the Body be brought here, and we ſhall ſee whether you have done right; and then you may plead to the Juriſdiction, or Lord Warden may come and claim Conuſance of the Cauſe.

Downci and *Keach. Trin.* 1 *Annæ.*

Whether an *Ha' Cor' ad reſpondend'* will lie to bring a Perſon into *B. R.* who is in Execution in a Civil Cauſe in the Admiralty.

THIS was a *Ha' Cor'* directed to the Officer of the Admiralty Priſon, to bring up the Body of one who was in Execution there for 150 *l. ad reſpond' de pl'ito quod reddat* the Plaintiff 13 *l.* and the *Ha' Cor'* was returned, and the Defendant brought up.

The Queſtion made was, Whether a Perſon in Execution in the Admiralty Priſon, for a Civil Cauſe, may be brought up to the King's Bench to be charged with a Declaration on a *Ha' Cor'*, that is, whether a *Ha' Cor' ad reſpondend'* will lie? And inſiſted it would, elſe there would be a Failure of Juſtice, eſpecially in this Court that can hold Plea in any Cauſe whatever, and can give Remedy in all Caſes where there is a Right.

If a Man was in Cuſtody of the Marſhal, he could not formerly be ſued elſewhere; if another had a Suit againſt him, by *Magna Charta*, could not be ſued out of this Court; but ſhould be ſued here, becauſe the Court will not ſuffer a Failure of Juſtice. *Jones* 380. 2 *Inſt.* 23. 4 *Inſt.* 71.

Beſides his being in Execution here, will not diſcharge him of the Execution in the Admiralty Court: In a Suit for calling Whore in the City, may be in Execution here, for Coſts there. 2 *R. A.* 59. 4 *Inſt.* 290. *Hard.* 476. Perſons in Execution by Court of Chancery in the *Fleet*, are turned over here.

Holt Chief Juſtice ſaid, perhaps here is a Fraud to turn him over here, that he may Eſcape and have his Liberty; this is but for 13 *l.* and in the Admiralty the Execution was for 150 *l.* and here is no Action depending in this Court. The *Ha' Cor'* is not right, and ſo we will remand him on this *Ha' Cor'*, and you may get a more proper one if you can, but this is not a proper one at all; it is a *Ha' Cor' de pl'ito quod reddat*, which does not lie without an Original, and the Declaration is ſubſequent. Suppoſe it was a *Ha' Cor' ad faciend' & recipiend'*, we ſhould remand him, becauſe we have no Cauſe before us. An *Ha' Cor'* is not ſufficient for us to hold Plea in; if we had ground to commit him, then he is in Cuſtody, and he may be charged; in inferiour Courts we can hold Plea of the Cauſe, and therefore in that Caſe we will do it; and ſo was remanded to Admiralty Priſon.

Ha' Cor' de placito quod reddat does not lie without an Original.

Lock verſus *Hayton.*

A Perſon intereſted in the ſame Queſtion is not a good Witneſs, unleſs when there is a neceſſity in the Nature of the Thing.

CAUSE tried at *Niſi prius per* Lord *Parker* Chief Juſtice; it was an Action on the Caſe on a Policy of Inſurance, and the Plaintiff having proved the Policy and Premium, the Maſter of the Ship was call'd as a Witneſs, to prove the Loſs of the Ship and Damage; and upon aſking him the Queſtion, it appear'd, that he had made an Inſurance, not on the Goods of the Ship, but on ſome Goods of his own in the Ship, and confeſs'd he had inſured in that Manner; and the Chief Juſtice doubted whether he was a good Witneſs to prove the Loſs or not; and ordered the Court to be mov'd, and it was mov'd accordingly.

Caſes where a Perſon intereſted may be a Witneſs.

Sir *Peter King* mov'd, and urged he was a good Witneſs; and quoted 3 *Mod.* 114. and 13 *Car.* 2. againſt Deer-ſtealing, where Informer has a Part, yet Conviction good; in Robbery, a Man ſwears for himſelf, becauſe they can get no other Witneſs; ſo on the Statute of Conventicles, Informer is a good Witneſs, and yet he has Part of the Penalty. He has no immediate preſent Benefit, and his Demand is on a

different Contract, and is moſt likely to give the beſt Account of this Matter.

The Caſe of *Bath* and *Montague*, *i. e.* on an Indictment of Perjury in that Cauſe, where it was ſworn that Mr. *Strode* was at *F.* ſuch a Day, there were ſeven or eight Indictments for the ſame Perjury againſt ſeveral; and in that Caſe one was admitted an Evidence for the other, for the Perjury of one was not the Perjury of the other; the Caſe alſo of Seamens Wages, it is common for one Seaman to be Witneſs for another. So on the Act verſus *Burglars*, tho' a Witneſs has Reward of 40 *l.* yet he is Witneſs; in an Action by a Maſter *per quod Servitium amiſit*, the Servant is a good Witneſs.

Dee and *Whitaker econtra.* 3 *Lev.* 152. Caſe of a Bet at a Race.

The Reaſon of Earl of *Bath* and *Montague*'s Caſe was, if one were not a Witneſs for the other, they muſt be all convicted, becauſe they could have no Evidence; in Caſe of Forgery of a Bond or Note on an Information, if the Party is to have a Benefit by it, as to be diſcharged from the Bond or Debt, he is no Witneſs; Caſe of *The Queen* and *Dean*, in this Court; ſo the Caſe of *The Queen* and *Hedges*, which was an Order for Wages due from a Maſter to a Servant, it was made on Oath of the Servant, and the Order was quaſhed; and in the former Caſe of *Dean*, one *Williams* was produced as a Witneſs, who gave the Note, to the Forgery, but was ſet aſide and not allowed. Poſt. 248, 249.

So the Caſe of a Servant produc'd as a Witneſs to prove the Delivery of Goods, he is allowed to be a Witneſs, if the Goods are delivered accordingly, for the Neceſſity.

Powis Juſtice: Where an Action is brought by a Trader in Town againſt a Country Chapman, and the Carrier was produced as a Witneſs, it was doubted, whether he was a good Witneſs; but *per* Chief Juſtice, I ſhould not doubt but he was a good Witneſs, for he is your Servant for that Purpoſe as much as a Porter, for he is not directly chargeable but upon a Suppoſition that he has not done his

his Duty, and if he has he is not chargeable at all, and a Servant is a Witneſs out of Neceſſity.

Chief Juſtice *Parker:* In Caſe of Tenants in Common, their Right is diſtinct, yet they are equally concern'd, and the Matter concerns them all; the Caſe of a Wager is much the ſame; ſuppoſe it goes with the Plaintiff, this Perſon has ſtill a Demand; here is an Action brought diſtinct from that which the Maſter has, ſo it ſeems to be the ſame Caſe as that of a Wager where one bets, and a Policy of Inſurance is ſomething more.

Seamen as to Wages, one may be Witneſs for the other, and ſo may the Maſter, but here he has another diſtinct Intereſt as an aſſured; ſuppoſe all the Seamen had inſured, as they may do, I ſhould then think the Maſter and the Seamen might be all Witneſſes one for another.

So where the Matter is Perſonal, as in Caſe of Battery, the Party may be Evidence in the Nature of the Thing; the Caſes on Acts of Parliament where a Sum given, they do not come up to this Caſe; but in Caſe of an Informer who has Part of the Penalty, it is uſual to ſet up another Informer, and Informations have been quaſhed where otherwiſe; and as to the Caſe of 40 *l.* for apprehending a Felon, if he were diſallowed, there would be no Proof ſufficient to convict, ſo of Neceſſity is a Witneſs, as in Caſe of a Hundred Robbery.

Vide *The Queen* and *Cobbold*, *Mich.* 12 *Annæ*, on Game Act for keeping Greyhounds, Informer who has half Penalty, no Witneſs.

Eyre Juſtice: In Caſe of an Horſe Race, one that bets can't be a Witneſs, tho' he can have no Advantage in that Action; in Caſe of Deer-ſtealing, on that Act if Informer be a Witneſs, the Conviction will be quaſh'd; and as to Act for Reward of 40 *l.* it is given by the Act, ſo as they proſecute. So upon the Statute of Reſtitution of Felons Goods in *H.* 8.

tho' reſtored to the Proſecutor on Conviction, yet he is always allowed as a Witneſs.

Caſe of *Godwin* and *Palms*, *Paſch.* 5 *Annæ*, before Chief Juſtice *Holt*, upon Action of Caſe for negligently keeping of his Fire, every one who had Damage by the Fire, having a Right to bring their Actions, was refuſed to be an Evidence.

Chief Juſtice: Where there are Witneſſes allowed for Neceſſity, it muſt be a Neceſſity from the Nature of the Thing. The Queſtion was, Whether the Ship was taken by the *French*? The Maſter will recover 100 *l.* having inſured ſo much.

This Queſtion was put to all the Judges, If the Maſter could be a good Witneſs to the Loſs of the Ship, having inſur'd his Goods, no Part of the Goods inſur'd on this Policy? *Per* all the Judges, he is no good Witneſs, becauſe he had an Intereſt in the ſame Queſtion, tho' he could gain nothing in this Suit, and here was no Neceſſity, for others might prove this; but as to the *Quantum* to intitle to Salvage, he was a Witneſs, becauſe Nobody ſo proper as he. Chief Juſtice put this Caſe, Servant puts Things of his own in Maſter's Box, and Servant carries to Carrier, held *per omnes* Witneſs for Neceſſity.

Ref. The Maſter of a Ship not a good Witneſs to prove the Loſs of her, he having inſured ſome Goods in the Ship.

DE
Term. Sanct. Hill.

11 *Gulielmi* III. In the King's Bench.

HIGHWAYS.

The King and *Ragby, or Inhabitants of Ragby.*

THIS was a Preſentment on View of Juſtices, that Highway was out of Repair, on the Statute of Queen *Mary* for the Repair of the Highways; and a Fine of 20*s.* was ſet to be levied for the Repairing the Way, unleſs it were repaired before next Quarter-Seſſions, and that then it ſhould be levied.

Exception was taken to this Judgment, being removed by *Certiorari*, that the Judgment was conditional and not abſolute, and ſo erroneous.

A Judgment ought to be poſitive, and not conditional.

Per Holt & Cur', The Judgment ought to be poſitive and abſolute, and can't be upon Condition, the Fine ſet is the Judgment for a poſitive Offence, and ſaying it ſhould be levied is the Award of Execution; and ſetting a Fine conditionally, is more like a Pain ſet on the Breach of a By-Law, than a Judgment, which muſt be abſolute; ſo the Judgment was held naught.

The

The King and *Ogden. Hill.* 13 *W.* III.

THIS was an Order of Seſſions, upon an Appeal of Sir *Nathaniel Nappier*, upon an Inquiſition returned on an *Ad quod damnum* proſecuted by the Defendant for altering a Highway; and this was upon the Statute of 8 & 9 *W.* 3.

Court adjudged the Incloſure of Highways was to the Damage of ſeveral Perſons, and orders the Incloſure to be thrown open. Farreſly 45.

Holt Chief Juſtice: At Common Law the Writ of *Ad quod damnum*, tho' return'd no Damage, yet was not a ſufficient Authority to incloſe, but only a Preliminary and Foundation, for the Inquiſition returned is no Authority to incloſe, until a Licence, and there muſt be a Licence from the Crown granted; and the Act does not make the *Ad quod damnum* of greater Effect than it was before.

The Effect of an *Ad quod damnum* as to altering an Highway.

Firſt Exception that was taken was, That the Appeal given by the Act is to be made the next Seſſions, after the *Ad quod damnum* and Inquiſition taken; and the *Ad quod damnum* appears to be 27 of *December*, and the Appeal was *Eaſter* Seſſions, and *Epiphany* Seſſions did intervene, ſo the Appeal was not in due Time, and therefore moved to quaſh the Order for that Reaſon.

At what Seſſions Appeal to be brought.

Second, Not ſaid that this Appeal was made by the Parties griev'd; which are the Words of the Act; only ſaid that the Appeal was made by Sir *Nathaniel Nappier* and *A. E.* but don't ſay they were Perſons griev'd.

Third, Complaint is, for incloſing new Way, whereas the Damage is for incloſing the old Highway.

Anſwer, They did appeal the next Seſſions after the Incloſure, and the King's Licence is to come after that.

Secondly, This being Incloſure of the King's Highway, is in its Nature a publick Nuſance, ſo it is a Grievance to all the King's Subjects, and conſequently muſt be to thoſe who have appealed.

Next

Next *Trinity* Term the Court gave Judgment, that the Order was naught and ought to be quaſh'd.

Holt Chief Juſtice gave the Reſolution of the Court, that the moſt reaſonable Conſtruction of the Act ought to be, that the Appeal is to be made the next Seſſions after the Inquiſition return'd, and after the Grievance made and done; after the Incloſure, that is after ſuch an Incloſure as may be done by Law, that is after an Incloſure made by Virtue of the King's Letters Patent; it appears from the Appeal it was after the Inquiſition.

Reſolved, *Firſt*, That the Statute alters not the Nature of the *Ad quod damnum*, nor the Proceedings thereupon.

The Writ is to be return'd into Chancery.

Secondly, After the Writ of *Ad quod damnum* is executed, it is to be returned in Chancery *ſine dilatione*; tho' the Juſtices have Conuſance, yet the Writ muſt be returned there, that the Queen may be informed, in order to grant the Licence, or to controvert it. And

Tho' the Return be favourable, a Licence is neceſſary.

Altho' it be returned it is no Damage to any of the Queen's Subjects, yet Party can't incloſe till a Licence be granted for that Purpoſe; for at Common Law, tho' Inquiſition found, yet it would be a publick Nuſance, without the King's Licence, for the Inquiſition gives no Authority to incloſe, but the Licence from the Crown. Now after this Inquiſition and a Licence granted, the new Way becomes the King's Highway, and the old Way ceaſes to be ſo; and it is in the Election of the Queen, tho' the Jury find it is no Damage to any one, whether ſhe will give Leave to incloſe it or not; ſo that the Prerogative of the Crown is not bound by any Words in the Act, nor by the Inquiſition, which is only to inquire what Damage it may be to the Publick, *cui concedamus licentiam* to incloſe.

But now it is ſaid, this Writ being brought under the Conuſance of the Juſtices, how can it go into Chancery? I think, very well, for the *Vic'*, after the Inquiſition taken, muſt

muſt make a Return; and this Appeal at the Seſſions on the Return of the Inquiſition is only to ſupply the Place of a Traverſe at Common Law, which might be to theſe Inquiſitions. If no Appeal, will be good to found a Licence upon, if there be one, and the Seſſions give Judgment, it will be found on the Rolls of Seſſions, and this will be a good Counter-Plea to any Traverſe, that Judgment was given at the Seſſions purſuant to this Act, which is to be final.

Thirdly, As to the Time when the Appeal is to be made, the Meaning of the Act is, that it muſt be made at the next Seſſions after the Grievance; and not the next Seſſions after the Inquiſition taken and Incloſure made. Before the Incloſure, Nobody is grieved; ſo that the true Meaning of the Act muſt be the next Seſſions after the Perſon is grieved by the Incloſure after the Inquiſition, now this Incloſure is not made by Virtue of the Inquiſition, but without any Authority or Licence from the Crown, ſo it does not affect the Appeal. Now ſince no Incloſure can be made by Law on an Inquiſition till a Royal Licence is granted, when the Party obtains a Licence to incloſe, and does it by that Licence, then the Party is griev'd, but till then there is no Injury done, and from that commences the Time for the Appeal, which muſt be the next Seſſions after the Inquiſition and Incloſure made by Virtue of a Licence from the Crown.

The next Seſſions is the next Seſſions after the Grievance.

Per Cur', Let the Order of Appeal be quaſh'd.

The Queen verſus *Inhabitants of Stratton, Paſch.* 4 *Annæ.*

ON a Writ of Error, of Indictment for a Nuſance in Highway, and the Indictment ſet forth, that the Way was *tam anguſta*, that People could not paſs and repaſs.

Indictment for incloſing an Highway, what to ſet forth.

Holt Chief Juſtice ſaid, that it was no Fault newly to incloſe a Highway that lies open of each Side, if they keep it in Repair.

Per Cur', *Tam anguſta* has no particular Meaning, and is uncertain, for perhaps it was always ſo, therefore ought to ſet out the Dimenſions of the Way as it was before, how many Rods in Length and Breadth, and then ſhew how it came ſo ſtraight, and that they made it ſtraighter than it was before; it was adjorn'd.

The Queen verſus *Brandling, Mich.* 10 *Annæ Reginæ.*

Surveyors of Highways to account at Special Seſſions, and not at General Seſſions; in ſuch Caſe *Certiorari* lies.

ORDER made againſt the Surveyors of the Highways to account for Money received, at the Quarter-Seſſions; and it was quaſh'd, becauſe it ſhould be made at the ſpecial Seſſions and not at the General Quarter-Seſſions; in this Caſe it ſeems they refuſed to account before three Juſtices at the Special Seſſions, and therefore this Order made at the Quarter-Seſſions.

Then objected, no *Certiorari* by the Act ought to go, but *per Cur'*, that is only where the Queſtion is about Non-repairing the Highway, but not in this Caſe where it concerns the Accounts only of the Surveyors for Money received; beſides the Court ſaid this Objection ought to be made before the Filing this *Certiorari.*

The Queen and *Inhabitants of Hornſey, Paſch.* 1 *Geo.*

Perſons indicted, and found Guilty for not repairing an Highway, being indulged with Time to repair it, ſhall pay Coſts to the Proſecutors.

THIS was an Indictment prefer'd in the King's Bench originally againſt the Defendants for not repairing a Land call'd *Hornſey-Lane*; Plea was, *quod via eſt privata via, abſque hoc quod via illa eſt communis & antiqua alta via Regia modo & forma, &c.* after a View had it was tried in the Country, and a Verdict for the Queen.

The

The Defendants at ſeveral Times made their Application to the Court to ſtay the entring of Judgment, that they might have Time to amend the Highway, and Time was granted accordingly, and when the ſame was amended the Defendants mov'd to diſcharge the Recogniſance without Payment of Coſts to the Proſecutor; inſiſting that this Indictment not coming from the Seſſions, they were not intitled to Coſts, and the rather becauſe whatever Fine the Court ſhould ſet, it muſt by the Statute be employed towards the Repairs of the Way in Queſtion. But notwithſtanding, the Court was of Opinion to allow Coſts in this Caſe, and ordered it accordingly, otherwiſe the Proſecutors, who were two private Perſons, who had been at 50*l.* expence, would be the only Sufferers.

DE
Term. Sanct. Mich.

7 *Annæ Reginæ.*

Harrington verſus *Buſh.*

ACTION of Treſpaſs for taking and impounding Cattle, and detaining them till Defendant paid 10 *s.* for them: The Defendant pleaded in Bar that *J. S.* was poſſeſſed of the Cloſe *in quo* for a Term of Years, and being ſo poſſeſſed, the Cattle of the Defendant were there Damage-feaſant, and that he as Servant to *J. S.* took them Damage-feaſant; to which the Plaintiff demurr'd, and ſhew'd for Cauſe, that the Defendant had ſet out no Title, but only that *J. S.* was poſſeſſed.

Whether in Plea in Treſpaſs for taking Cattle Damage-feaſant, the Defendant need ſet out a Title. Rep. A. Q. 219.

Herring

Herring for Plaintiff ſaid, Defendant ought to ſet out a Title as well in Treſpaſs as in an Avowry, according to the Caſe of *Pell* and *Garlick*, 12 *W.* 3. 2 *Lutw.* 1492.

But *per Holt & Cur'*, the true Diſtinction is, that in an Avowry a Title ought to be ſet out, but in a Plea in Bar it is otherwiſe; but *per Cur'*, we will look into that Caſe.

Serle verſus *Blackmore*, 6 *Annæ Reginæ*, *in B. R.*

The Subſtance of Sir John Forteſcue's *Argument in Arreſt of Judgment, being of Counſel for the Defendant.*

This is an Action of the Caſe for falſly and maliciouſly cauſing the Defendant to be arreſted and impriſoned, under Pretence of a certain pretended Warrant by an inferiour Court [naming it] ſuppoſed to be made at the Suit of the Defendant, *ubi revera* he had not any Cauſe of Action, by Reaſon of which ſhe was deprived of her Liberty.

Whether Caſe will lie for arreſting, &c. without Cauſe of Action.

1ſt Objection not ſaid that the Defendant knowing he had no Cauſe of Action, &c.

1*ſt Exception*, HE does not ſay *Sciens*, that he knew and was conſcious to himſelf he had no Cauſe of Action, for if he was miſtaken in his Action, thinking he had good Cauſe of Action, when really he had none, no Action of the Caſe will lie, becauſe no wilful Offence; nor a deſign'd Vexation; and common Experience in the Courts of Juſtice ſhews us that the wiſeſt Men are ſometimes miſtaken in their Cauſe of Action.

Indeed where an Act itſelf is unlawful, as ſuing in a wrong Court, there the Plaintiff need not ſay, *Sciens*, becauſe no Man is or ought to be preſum'd ignorant of the Law, as 'tis the Rule of his Actions; in which Caſe Malice is naturally and neceſſarily infer'd: So likewiſe in all Actions which in their Nature have Fraud or Violence in them appearing on their Face, but where an Act is juſt and

lawful, as addreſſing to a proper Court of Juſtice for Relief againſt Oppreſſion, the Plaintiff there muſt expreſly lay it, that the Defendant knew he had no Cauſe ſo to do, and ſo was knowingly Vexatious: But to infer Malice from a Man's ſuing, tho' properly without Cauſe of Action, is but very odd Reaſoning, nor is there any neceſſary Connection in that Argument; therefore if this Defendant did not know but that he had a good Cauſe of Action, but ſues, and it appears after he has no Cauſe of Action, this Action will not lie, becauſe he has innocently made Uſe of the Proceſs of the Law, which is the Right of every Subject, and juſt and neceſſary to the Support of all Societies.

15 *Jac.* 1. Agreeable to this is the Opinion of my Lord *Hob.* in the Caſe of *Waterer* and *Freeman*, in which Caſe he delivers the Opinion of the Court, *Hob.* 205, 266. That was an Action of the Caſe for ſuing out a double Execution by Way of *Fieri Facias*, where it is expreſly laid the Defendant knew of the taking the Goods on the firſt Execution; my Lord *Hob.* ſays thereupon, if the Defendant in this Cauſe had not known of the Cattle firſt taken, he had not been ſubject to this Action. And in another Place in the ſame Caſe, he expreſſes himſelf full in Point, for where he is enumerating the Properties of this Action, he mentions this to be one as eſſential to the Nature and Frame thereof, that the Defendant muſt know he has no Cauſe of Action, ſo that it ſeems with him, that *Sciens* is a conſtituent and neceſſary Part of this Action. So is the Opinion of *Levinz* 3. 211. which was an Action for ſuing out a *Quo minus* without Cauſe, and it wanted *Sciens*, tho' that Caſe is ſtronger than this, becauſe at the latter End 'tis laid, that he was procured to be detained in Priſon till he gave a Warrant of Attorney to confeſs Judgment for 20 *l.* which ſeems to inſinuate Fraud. So is the Caſe of *Soams* and *Barnardiſton*, the Defendant *præmiſſa ſatis Sciens*, he was elected, 2 *Lev.* 114. *Hardreſs* 194. the Defendant well knowing the Premiſſes, that was an Action for falſly procuring an Information in the Exchequer, whereby his Goods were condemn'd. And 3 *Cro.* 836. *Bray* and *Partridge*, 2 *Cro.* 667. which is Action of Caſe for ſuing the Bail after the Principal had ſurrender'd him-

1 D'Anv. 79. pl. 4. 195. pl. 9.

1 D'Anv. 79. pl. 5. 88. pl. 12. 194. pl. 2. Hob. 205. 266.

himſelf, there it is aver'd the Defendant well knew of the Surrender and Recognizance being diſcharged. So if a Man pretends a Title to my Land, and he publiſhes this, no Action of Slander will lie againſt him, becauſe he only aſſerts that Right which he thinks he hath; this is done in Order to recover it, but if he knows his Title to be falſe, and that be aver'd, an Action will lie for the Falſity and Injury. *Hob.* 205. And ſo all the Caſes have *Sciens*, except thoſe which do in their own Nature neceſſarily imply a Knowledge in the Defendant of the Thing done amiſs.

I expect to have it objected that here is the Word *Malitioſe* as well as *Falſo*.

This not made good by the Words *Falſely* and *Maliciouſly*.

Anſwer, That without *Sciens* will not do, for if a Self Conſciouſneſs of having no Cauſe of Action be neceſſary to be laid, the Word *Malitioſe* will not fill up its room, and imply the ſame, for 'tis no neceſſary Conſequence at all, that becauſe he maliciouſly ſued without a Cauſe, that therefore he knew he had no Cauſe. For the Knowledge of a Cauſe of Action is not included in the general Notion of a malicious Proſecution, becauſe a Man may with moſt effectual Malice proſecute a Suit againſt another, and yet have a good Cauſe of Action. And therefore in all thoſe Caſes I mentioned before, there is not only *Falſo* and *Malitioſe* but *Sciens* too, and in the Caſe of *Soams* and *Barnardiſton*, it is not only ſaid *Falſo* and *Malitioſe* but *Sciens* too; it is poſitively laid that the Defendant knowing the Plaintiff was duly elected, did yet make a double Return, and ſo urg'd all along in that Caſe that 'twas a Thing againſt his own Knowledge, and with humble Submiſſion, it is as difficult for a Man to know whether he hath a Cauſe of Action, as it is for a Sheriff to know whether a Perſon has a Majority of Voices, therefore if one be neceſſary, the other muſt.

Does not ſhew what the Cauſe of Action, nor in what Court, nor againſt whom.

A 2*d Exception*, He does not ſhew what the Cauſe of Action was in the firſt Suit, nor in what Court, nor againſt whom it was; he only ſays, *ſuper quandam Actionem* of the Plaintiff at the Suit of the Plaintiff, ſo that this may be an

Action againſt any Body elſe, on which the Plaintiff was impriſoned. And the Conſequence of that is, that this Action being Vague and Uncertain, nor circumſcribed by any knowable Marks or Characters, we can't plead a Recovery for Vexation in this Action, if the Plaintiff ſhould think fit to bring another for the ſame Cauſe. He ſhould at leaſt have bounded and limited this Action that was ſued cauſeleſsly, and have deſcribed it with ſo much Certainty, as (if it had been brought upon the Stage again) we might have diſtinguiſh'd it from another, elſe there would be many Recoveries for one and the ſame Thing, and ſo a Man be liable often to be puniſh'd for the ſame individual and numerical Crime, which the Law will not allow. For ſuppoſe the Plaintiff ſhould recover in this Action, and ſhould bring another for the ſame Thing, and ſhould lay it as a Plaint affirm'd in that Court for five or ſix Pounds, as really I believe it is, the Pleading of a Recovery in a certain Action in no Court, and againſt Nobody, will not be a Bar to an Action in a certain Sum in a particular Court and againſt a certain Perſon; ſo that as by this Way of Proceeding he may recover twenty Times for the ſame Thing, and it will not be in our Power to plead any Recovery in Bar. And all the Caſes in the Books are ſo, and the Precedents too, and I believe there is ſcarce one to be ſhewn to the Contrary.

Beſides he ſhould have ſhewn what was become of this Action, and how it was determin'd, and for this Reaſon, becauſe it may be that we had Judgment in the former Action, and then to bring an Action for a Malicious Proſecution after Judgment had, this would be to ſet up one Judgment to fight with another, and to open a Way to avoid and defeat the Fruit and Effect of all Judgments by a collateral Way, and would diſcourage juſt Proſecutions; and if this were allowed, as my Lord *Hale* ſays in the Caſe of *Vanderbergh* and *Blake*, in *Hardreſs* 194. the Judgment would be blown off by a ſide Wind, and therefore clearly adjudg'd in that Caſe, that no Action would lie againſt an Informer, for falſely, cauſeleſsly and maliciouſly proſecuting an Information in the Exchequer, whereby the Plaintiff's Goods were condemn'd Hard. 191.

demn'd in that Court to the King, becauſe here is a Judgment that is quite contradictory to it. And if it ſhould be allow'd to bring this Action, as here is done, without ſaying what is become of the Suit, this very miſchievous Effect muſt follow.

Does not ſhew in what Sum, nor any Damage, nor aggravates by forcing him to find extravagant Bail, &c.

A 3*d Exception*, He does not ſhew in what particular Sum this Action was, nor does he ſhew any particular Damage to the Plaintiff, beſides the neceſſary Effects and bare Conſequences which naturally attend all Arreſts whatſoever, which is Impriſonment and Confinement; ſo that this Declaration amounts to no more than an Action of the Caſe for an Arreſt on Proceſs in a Court that had Juriſdiction, without Cauſe of Action, in which Caſe no Action will lie, unleſs aggravated by laying it in a large and great Sum, and ſo forc'd to put in extravagant Bail; as the Caſe of *Skinner* and *Gunter* is, 1 *Vent.* 12. and more exactly reported in 1 *Saund.* 228. or elſe that by Reaſon of the great Sum laid he could not find Bail, as the Caſe of *Daw* and *Swain*, 1 *Mod.* 4. 1 *Sid.* 424. Or for maliciouſly affirming to the Sheriff, that the Defendant ow'd him great Sums of Money, ſo that the Sheriff inſiſted upon great Bail, as the Caſe of *Daw* and *Swain*.

1 D'Anv. 208. pl. 5. 213. pl. 3. Raym. 176. 2 Keb. 473, 476, 497. 3 Keb. 118.

1 D'Anv. 196. pl. 14. 1 Lev. 275. 2 Keb. 546.

I hope to make it appear that both the antient and modern Caſes will ſupport this Objection, and that they are ſupported by ſound Reaſon.

I ſhall begin with 43 *Ed.* 3. 20. Caſe adjudged to lie there where one procures another to take out a *Formedon*, but if the Party had ſued it out himſelf, tho' no Cauſe of Action, Action would not have lain; ſo that the Action, it ſeems, lies only for an officious Vexation, and not for ſuch as reſults from a Man's Endeavours in recovering his Right and ſuing for Juſtice. 9 *H.* 6. 32. Where the Defendant has no Wrong but by Reaſon of Male Vexation in ſuing Proceſs, he ſhall not recover Damages in our Law, unleſs in ſpecial Caſes.

5 *Ed.* 4. 126. That was an Action for forging a Bond in the Plaintiff's Name, and putting of it in Suit againſt the Plaintiff; tho' it was agreed the Action would lie for both together, yet alſo agreed, it would not have lain for one of them alone, neither for the Forgery nor Vexation in the Suit. And there it is expreſly ſaid that at Common Law, where an Action was ſued, and the Plaintiff barr'd, he ſhould not have an Action for the Vexation, Trouble or Coſts that the Defendant was put to in acquitting himſelf. And if ſuch Action was maintainable, ſays that Book, this would be the Inconvenience, that on every Bond, Action of Treſpaſs, or other perſonal or real Action, the Defendant, if he get the better, will have an Action of the Caſe againſt the Plaintiff for a falſe Suit, which is not maintainable in our Law. 'Tis ſaid, in that Caſe theſe Actions for Male Vexation are only ſuffer'd in peculiar Caſes, as where no other Remedy can be, or where the Damage is very great, as upon Indictments and Appeals of Felony, becauſe, beſides Impriſonment, there is Hazard of Life and Reputation; or elſe where one is diſinherited in his Perſon, as where a Man is confeſs'd a Villain by his Attorney, as the 42 *Ed.* 3. is, or diſinherited of his Land, as by forging of falſe Deeds, and ſuing on them to diſinherit, or elſe where Land is loſt, or likely to be ſo, as where an Attorney confeſſes Judgment in a real Action deceitfully without Warrant; or where a Protection is ſued falſly, or falſe Releaſe pleaded in a *Præcipe quod reddat*, for which the *Parol mis eſt ſans Jour*; but for an Action to lie, which charges only the Perſon or his Goods, 'tis ſaid there never to be known to lie, nor has been brought. And ſo is 21 *Ed.* 4. 23. there ſaid poſitively, if an Original be ſued againſt a Man, tho' he have no Cauſe of Action, you ſhall never have an Action. So is *Fitzh. Nat. Brev.* a Man cannot be excommunicated for ſuing a Prohibition to the Spiritual Court without Cauſe, for a Man ſhall not be puniſh'd for ſuing forth Writs in the King's Courts, whether he have Right or Wrong. *Co. Lit.* 161.

And in 2 *R.* 3. 9. 'tis agreed ſo by all the Judges of *England*, who gave their Opinion in the Matter, upon the

King's demanding the Queſtion in Perſon, what Remedy was there, if a Man bring a falſe Action? The Anſwer was, *Nulla ſequatur pœna pro proſecutione falſæ Actionis, quia non Intell' quouſque terminetur, & tunc Amerciamentum Regi, &c.* they were of the ſame Opinion, tho' the Party arreſted ſhould die in Priſon.

Then as to the Modern Caſes, I ſhall quote but three or four that I think with Submiſſion pretty ſtrong to the Purpoſe, tho' there are many more might be quoted.

The firſt then is *Cro. Eliz.* 836. This was an Action of the Caſe for ſuing in the Spiritual Court for Tithes, before paid in the Preſence of two Witneſſes, after one of them was dead, the Defendant well knowing that the Proof of Payment by one Witneſs is not ſufficient in the Spiritual Court. All the Court held the Action would not lie, for an Action lies not, ſays the Court, for proſecuting at the Common Law without a Cauſe, and the ſame Law is for proſecuting in the Spiritual Court: And *Popham* ſays there, when a Man complains in a Court which has Power to give Remedy for the ſame, tho' his Suit be without Cauſe, yet the Plaintiff ſhall not be puniſh'd by an Action of the Caſe, to which *Rolls* agrees in his abſtracting this Caſe, 1 *Rolls* 102. So that tho' here was plain Vexation, and there could be no Cauſe of Action, and tho' ſaid expreſly the Defendant well knew of the Premiſſes, yet the Action was not allowed, which is a much ſtronger Caſe than ours, and is after Verdict too. Another Caſe is 2 *Cro.* 133. That was an Action of the Caſe for ſuing in the Spiritual Court for Tithes of Trees not tithable; agreed *per tot' Cur'*, that the Action would not lie, and the Reaſon is given becauſe it is a Matter properly demandable there, therefore not puniſhable tho' he have no Cauſe of Action; but if the Court had had no Juriſdiction
13 Car. 2. the Action would have lain, becauſe then the Suit was truly Vexatious. *Hardreſs* 194. *Vanderbergh* verſus *Blake*, Action of Caſe for falſly and malicioufly proſecuting an Information in the Exchequer, whereby his Merchandize was ſeiſed and condemned without Cauſe. By the whole Court, Lord Chief Juſtice *Hale* being preſent, the Action will not lie.

Then

Then there is the Caſe of *Law* and *King*, 1 *Lev.* 240, 414. 1 *Saund.* 131. 1 *Mod.* 58. reported in all thoſe Books, as likewiſe in *Keble*. That was Action of Caſe for maliciouſly and falſly, *ex malitia præhabita* preferring a Petition to the Committee of Grievances, and printing the ſame, without any true or probable Cauſe, where in Truth the Matters contained therein were grievouſly Scandalous and not True, whereby he was hurt in his Credit, hinder'd in the Execution of his Office, forc'd to expend divers Sums of Money, and undergo great Labours, and ſuffer great Vexation and Perturbation of Mind.

In the Argument it was agreed by all without Controverſy or Oppoſition, that the Exhibiting a Petition to a Committee of Parliament was lawful, and that no Action would lie for it, tho' the Matter contain'd therein be Falſe and Scandalous, becauſe, ſay they, it is in a Courſe of Juſtice, and before thoſe that have Power to examine whether Falſe or not; nay, ſays the Court, (which was the principal Point) tho' ſcandalous and falſe Matter be printed and publiſhed to the whole Parliament, yet no Action lies, becauſe it is the Order and Courſe of Proceedings there. This is a Caſe that comes pretty near, if not ſtronger, than our Caſe; for, in Point of Reaſon and natural Juſtice, what Difference is there between an Action in a Court at Law, and a Petition to a Committee? Both a Court and a Committee are Juriſdictions able, and conſtituted to relieve Complaints, and the Petition in the one Way may be as juſtly called *Jus proſequendi ad Judicium*, as the Action in the other, and the Party aſſerts his Right and expects Remedy in both; ſo far they are equal; but as to the Conſequences I confeſs they are very unequal, for in preferring a falſe and ſcandalous Petition to Parliament, at leaſt Five hundred Men muſt be ſuppoſed to know it, and perhaps the whole Kingdom; ſo it is highly prejudicial to a Man's Reputation; and then as to the Expence, Trouble and Vexation in Attendance and Proſecution, it is well known to be infinitely beyond that of bringing a ſmall Action for a trivial Sum of Money, where there can be no Hazard of Reputation, eaſy Attendance and Expence.

And

And what is the Reaſon of this Caſe? Why my Lord *Hale* gives it in few Words, becauſe, ſays he, it is the Courſe of Proceedings in Parliament; now what is that, but to ſay the Parliament is a Court of Juſtice, and that to exhibit a Petition there, whether the Matter of it be true or falſe is the Courſe and Method to have Relief there? And is it not the ſame here; are not the Courts of Law, Courts of Juſtice, and is not taking out the King's Writs and other Proceſs, whether the Matter thereof be true or falſe, the Courſe and Method to have Relief there? And tho' a Parliament be a Court ſuperior to the Courts at Law, yet one is not more a Court of Juſtice than another, nor the Proceedings of one more Proceedings, tho' in higher Matters, than the other. All Courts of Juſtice in their own Nature ought to be free, that all Mankind may have Liberty to come there, and the Proceedings therein to be kept inviolable. And indeed all the Caſes of this Nature have particular Averments; the Caſe of *Skinner* and *Gunter* is, that he did arreſt him in a very large Sum of Money on Purpoſe to have him impriſoned, knowing that he was not able to find Bail, *et ea intentione*, that he ſhould be kept in Priſon for want of Bail; and ſo are all the Reſt more or leſs Special, which will be too tedious to inſiſt on particularly. Then pleaſe to conſider the Inconveniency of this Doctrine, ſuppoſe for the Purpoſe I have a good Cauſe of Action, and ſue in a proper Court, and have the Perſon arreſted, and have a good Witneſs to prove my Cauſe of Action, but before the Trial comes on my Witneſs dies or is ſpirited away, and ſo I am nonſuited, will it not be very hard the Defendant ſhould have Coſts for the Nonſuit, and have a new Action, when perhaps the Plaintiff is not able to give Half the Evidence he could have given before, and recover, it may be, twice as much more upon that? And is it not yet harder to deem this Malice, a Crime to be puniſh'd, which is rather to be eſteem'd a Misfortune to be pitied? For indeed in the Reſult, and in Effect, this is to puniſh a Man becauſe he can't keep his Witneſſes alive. How would this Matter run in Point of Reaſoning? Surely it would conclude but oddly, to ſay, That becauſe my Witneſſes were dead, or becauſe I could not get them together, therefore

1 Vent. 12, 18, 19. 1 Saund. 228.

fore I brought an Action maliciouſly without a Cauſe; this would not paſs for very good Logick, tho' this Action in its Nature ſeems unreaſonable and to caſt an Aſperſion and Reflection upon the Court, wherein the former Action was, as tho' their Power were too feeble to give a full Recompence to the Party aggrieved. All Courts of Law have a Power to examine whether the Matter of Complaint be falſe or not, and if they find it falſe, the Common Law hath already given them a Power to puniſh the Offender *pro falſo clamore*, and not only ſo, but to award the Party grieved his Coſts too; ſo that this Action ſeems to contradict the antient Common Law of the Kingdom, which had ſufficiently provided for falſe Suits; for that Law ſays, that if a Man brings a falſe Suit, he ſhall be puniſh'd by Amerciament, he ſhall be *in miſericordia*; which is as much as to ſay, he ſhall be puniſh'd ſomething leſs than the Crime deſerves, or the Damage ſuffered by the other: ſo that for a falſe Suit the Law did not think fit there ſhould be a Puniſhment equal to the Damage done; but this Action quite contrary thereto gives Damage to the full; nay further, by this Way of Proceeding, and according to this Doctrine, a Man is puniſh'd four Times for one individual Crime; in the firſt Action he is amerc'd and puniſh'd *pro falſo clamore*, and perhaps Coſts to the Defendant on the Nonſuit; in the ſecond Action he anſwers the full Damages for the ſame falſe Suit, and is amerc'd again a ſecond Time for his falſe Defence of a Suit brought againſt him, for this falſe Suit. So that, my Lord, this Action ſeeming to labour under ſuch Abſurdities and Contradictions, it will have no Countenance from your Lordſhip. The having no Coſts and no Recompence in the falſe Suit, ſeems to be the trueſt and moſt rational Ground of this Action, and on this Ground began theſe Actions for malicious Indictments to creep into the World. To this Purpoſe ſays Chief Juſtice *Keeling* in *Mod.* 4. if there had been no Cauſe of Action, Caſe would not lie becauſe of the Recompence and Remedy, ſays he, the Law gives by Way of Coſts; and *Rolls* is of the ſame Opinion, for he taking Notice of the Caſe of *Waterer* and *Freeman*, 1 *Roll.* 34. If a Man bring an Action in a proper Court, no Action lies, becauſe the Suit was lawful, tho' the Cauſe of the Suit was

1 D'Anv. 79. pl. 4. 195. pl. 9 Hob. 205, 260.

not true, for which he ſhall pay Coſts; ſo that the having Coſts in any Suit is a ſufficient Bar of this Action; and indeed in Fact our Caſe is after a Nonſuit and Coſts paid for that Nonſuit. But for a farther Confirmation of this, there is 1 *Vent.* 86. An Action of the Caſe is there allow'd to lie only upon this Reaſon and Ground, and that was an Action of the Caſe for maliciouſly ſuing in the Spiritual Court *ex officio*, and excommunicating him there; for, ſays the Court, this being ſuch a Suit as that no Coſts could be allowed in the Spiritual Court, therefore the Action lies; but agreed that the Action would not lie, where the Party in the Spiritual Court may have Coſts of Suit. The Reaſon of this Caſe exactly comes up to ours; for if it be ſo in the Spiritual Court, why not ſo in the Temporal Court? The Vexation in one Court is the ſame as the Vexation in the other, I mean as to its Nature, tho' it may ſomewhat differ in the Spiritual Court in Point of Degree. And ſo is 3 *Cro.* 836. I mentioned before.

I ſhall only mention one Exception more, and then ſhall conclude with my humble Thanks for your Lordſhip's great Patience.

That the Action is miſconceived. It ought to be falſe Impriſonment.

4th Exception, This Action is quite miſtaken, for on their own ſhewing this ought to be an Action of falſe Impriſonment, and not an Action on the particular Caſe, as here laid. For it does not appear by the Declaration, how this Inferiour Court, wherein this Action was brought is held, whether by Letters Patent or by Preſcription, for your Lordſhip cannot Judicially take Notice that this is a Court, unleſs it be ſet forth how it comes to be ſo, and your Lordſhip will intend nothing in an Inferiour Court; but what is more conſiderable, it does not appear there was any juſt Authority deriv'd from this Court to arreſt or impriſon the Plaintiff. Nay it appears quite the Contrary, and ſeems to be the principal Aim and Buſineſs of this Declaration to ſhew, that there was no Authority deriv'd from this Court, nor any Warrant or Precept iſſued therefrom. For it is ſaid *prætextu et colore cujuſdam prætenſi Warrant' per Cur' ill' fieri ſuppoſit'*, under Colour of a pretended Warrant ſuppoſed to be

be made, which is as much as to ſay, by Colour of a forged Warrant; then this Action muſt run thus, it is a Complaint for arreſting the Plaintiff by a forged Warrant, ſuppoſed and pretended to be made by this Inferiour Court, in a certain Action, but againſt Nobody, ſo that it might be a Suit againſt any other Perſon as well as againſt the Plaintiff. So then plainly, if this be an Arreſt by no Authority from this Inferiour Court, but by the Practice of the Defendant, and only a ſham Warrant; or if it ſhould iſſue by their Authority, and be in an Action againſt another Perſon, as it might be in this Caſe, not ſaying againſt whom the Action was, then this would be exactly the ſame Caſe, as if the Defendant had himſelf, without any Pretence of Authority, laid violent Hands on the Plaintiff and hurried him to Gaol; and if ſo, it is manifeſt this ought not to have been an Action of the Caſe, but an Action of falſe Impriſonment. For hereby it is become an immediate Wrong to the Perſon, and can't be call'd, with any Propriety of Speech, an Abuſe of the Proceſs of Law, but indeed not uſing at all, but to arreſt without its Aid. He ought to have ſaid a Plaint was enter'd in ſuch a Court ſo held, and in ſuch a Sum, and that a Precept iſſued out of that Court; and then he ſhould have gone on and ſaid, *Virtute cujus quidem præcept'* or *querel'* the Defendant was arreſted, and not *colore prætenſi Warrant'*, and ſo is the Caſe of *Skinner* and *Gunter* exactly; for otherwiſe the Defendant was not taken by any Proceſs of that Court, and then the Impriſonment is falſe, and conſequently another Action is to be brought. A Confuſion of Actions is a Thing the Law abhors, and every Species of Action hath its peculiar Boundaries and Limits, which the Judges of all Ages ſucceſſively have preſerved. 'Tis true, Actions of the Caſe and Actions of falſe Impriſonment are both for tortious Acts and Wrongs done, yet they are mightily different in their Nature, for the one is only a Wrong done to the Property of a Man, but the other is an immediate Wrong done to his Perſon. So the Action here deſign'd is for an Abuſe only of the Proceſs of Law, but an Action of falſe Impriſonment, is for an Abuſe and Violence to the Perſon. And the Law preſerves the ſame Difference in other Caſes; as a Theft or Larceny in General is

not

not ſo great, nor ſo grievouſly puniſh'd as Larceny from the Perſon. Beſides, in Actions of falſe Impriſonment the King has a Fine, and your Lordſhip will not ſuffer them to turn Actions of falſe Impriſonment into Actions of the Caſe, and leave it in the Power of a private Perſon to diſpoſe of the King's Right by changing the Action. And on this Reaſon is grounded the Caſe in 2 *Cro.* 134. where it is agreed by the Court, that an Action of the Caſe would not lie for acting contrary to the Prohibition of an Act of Parliament at the Suit of the Party alone, but muſt be as well for the King as for himſelf; and the Reaſon given is, becauſe otherwiſe the King would loſe his Fine.

Upon theſe Reaſons I hope Judgment ſhall be arreſted.

DE
Term. Sanct. Mich.

1 *Annæ Reginæ.*

HABEAS CORPUS.

Anonymus.

Procedendo awarded where the Return of *Ha. Cor. cum cauſa* was at too long a Day.

A *Habeas Corpus cum Cauſa* iſſued to remove a Cauſe out of *Windſor* Court, it was *Teſted* the 15th of *October*, and returnable the laſt Day of *Michaelmas* Term. To this Writ they returned according to the Statute, that Iſſue was joined before: But the Plaintiff mov'd for a *Procedendo*, becauſe the Return was ſo long, and for that ſole Cauſe only a *Procedendo* was granted.

Hether-

Hetherington and *Reynolds*, *Hill.* 4 *Annæ Reginæ.*

ACTION brought in Inferiour Court againſt Feme Sole, and afterwards ſhe marries, and the Baron brings *Ha' Cor'*, declaring in the ſame Manner as in Inferiour Court againſt the Feme only. Defendant pleaded in Abatement ſhe was a Feme Covert, and Plaintiff replied the Proceedings in the Inferiour Court, and that the Cauſe was originally againſt the Feme Sole; to which the Defendant demurr'd.

An *Ha' Cor'* does not remove the Record, as a *Certiorari* does. Salk. 8. Rep. A. Q. 142.

Ch. J. *Holt:* An *Ha' Cor'* does not remove the Record tho' it does the Cauſe, but a *Certiorari* removes the Record and Cauſe too, on which the Party has a Day here, and is enter'd on Record and the Plaint too, and we take Notice when the Proceedings begin; beſides a *Certiorari* goes to the Judge, but a *Ha' Cor'* to the Officer, and on a *Ha' Cor'* the Record is not here, but the Cauſe begins *de novo*; and the Declaration is againſt the Defendant *in Cuſtod' Mar' Mareſc'.*

Suppoſe before ſix Years are elapſed a Man ſues in an Inferiour Court, and the Defendant brings a *Ha' Cor'*, and ſix Years are elapſed before the Declaration in this Court on the *Ha' Cor'*, he can't take Advantage of the Statute without pleading this Special Matter, and he had a Right to his Action when begun below, and it ſhall not be in the Power of the Defendant to deprive him of that Right by his removing the Cauſe; for if a Suit be abated and ſix Years elapſe, he ſhall bring another Action by Journeys Accounts, for he ſhall not loſe the Benefit he had at firſt. So if a Man bring Action and dies, his Executor ſhall.

Differences between theſe Writs, &c.

Leach and *Page*, *Mich.* 10 *Annæ Reginæ.*

Superſedeas granted to *Ha' Cor'*, *&c.* to Mayor's Court in County Palatine of *Cheſter.*

SErjeant *Cheſhire* mov'd for a *Superſedeas* to a *Ha' Cor' cum Cauſa ad faciend' & recipiend'*, and alſo *ad reſpondend'*, directed to the Mayor's Court in the City of *Cheſter*, in that County Palatine; and Day was given to ſhew Cauſe.

At that Day ſeveral Precedents were quoted, where ſome Writs of *Ha' Cor'* were quaſh'd before any Return made, and others where a Return made; the Court would not receive it.

Of the firſt Sort there was *Mich.* 4 *Annæ*, *Mich.* 10 *Annæ*, An *Ha' Cor'* to the Mayor's Court of *Durham*; *Ha' Cor'* to Mayor's Court of *Nantwich.* In 1704, *Eachard* and *Bradſhaw*, *Mich.* 1705. *Bovy* and *Hall* in this Court; in 1706. *Ha' Cor'* to *Cheſter.*

In 2 *Keble* 134. there was a Return made to the *Ha' Cor'*, but the Court would not receive it.

Chief Juſtice *Parker:* If this Court can't do Juſtice, why ſhould we ſend for the Cauſe? if it be a County Palatine, Judgment will be void; it is not material what Court in the County Palatine the Suit is in; it had been material, if here had been an Affidavit that the Defendant was not reſident in the County. But here is an *Ha' Cor'* without any Suggeſtion that the Party is not an Inhabitant in the County Palatine, which in Reaſon ought to be, and ſuch Writs ought not to go out of Courſe, but there is yet no ſuch Rule; it does not appear to us we can do Juſtice; there is no doubt but they have Liberty to ſhew he liv'd out of the County Palatine; but here, tho' it ſhould appear he was reſident in the County Palatine of *Lancaſter*, it will be of no Avail, tho' you ſhew by Affidavit he did not reſide in *Cheſter*, for we can't do Juſtice in either County Palatine, we can't take away their Juriſdiction; but ſhould it be made out that the Defendant did not reſide in the County Palatine, we could do Juſtice, and would ſend a *Ha' Cor'*.

Per Cur', Let the Rule be abſolute, and let there go a *Superſedeas* to this *Ha' Cor'*.

Hide and *Browning*, *Paſch.* 11 *Annæ Reginæ.*

Ha' Cor' ad teſtifi'.

Whitaker mov'd for a *Ha' Cor' ad teſtificand'*, to the *Marſhalſea*, to be a Witneſs at Seſſions at *Guild-Hall*; and quoted a Caſe where Chief Juſtice *Holt* granted one for a Priſoner to go down to the Aſſiſes.

The King and *Mrs. Mary Hill Morton*, *Hill.* 11 *Annæ Reginæ.*

Ha' Cor' to bring up a Priſoner to attend her own Trial.

MRS. *Mary Hill Morton* was indicted for Perjury in ſwearing the Peace againſt the Duke of *Leeds*, and was in the *King's Bench* Priſon, and her Cauſe was to be tried in the Sittings after the Term, and mov'd the laſt Day of the Term for a *Ha' Cor'* to bring her up to attend the Trial of her Cauſe, and it was granted.

The Queen and *Nicols*, *Paſch.* 11 *Annæ Reginæ.*

Ha' Cor' ad teſtif' before Juſtices of Peace.

MOVED for *Ha' Cor' ad teſtificand'* before Juſtices of Peace upon a Conviction for Deer-ſtealing, directed to Keeper of *Newgate*, and granted; but Court ſaid, Juſtices could not compel the Witneſs to appear *nolens volens*, but if was willing, might be juſt.

The

The King verſus *Gibſon*, *Paſch.* 1 *Geo.* I.

Commitment of Overſeers of the Poor for not accounting, how to be.

RETURN made on *Ha' Cor'*, that the Defendant was committed by two Juſtices of the Peace, that he being Overſeer of the Poor did not account as by the Statute is directed, and ſet forth that he had not accounted before them.

Two Exceptions were made to this Return.

Firſt Exception, That this appears to be a Commitment within the Year, and the Act does not direct any Commitment till after the Year.

Second Exception only ſays, he had not accounted before them, whereas he might have accounted before two other Juſtices, and that would have been good. And both theſe Exceptions allow'd *per Cur'*; but yet the Defendant was not diſcharged, but on giving his Recognizance to appear at next Seſſions in Order to account, becauſe this was an Offence, and they had Power to call him to an account.

The King verſus *Hawkins*, *Paſch. or Hill.* 2 *Geo.* I.

Difference in Return of *Ha' Cor'* before and after Conviction.

THIS was on a Return of a *Ha' Cor'*, that the Defendant was committed for Backbearing and carrying away a Deer out of the Foreſt; but it appeared to be after Conviction.

Objected to this Return by *Pengelly*, that it does not ſay it was unlawfully taken away, becauſe it might be with Conſent of the Owner.

Chief Juſtice *Parker*: There is a Difference in the Return of a *Ha' Cor'*, when it is before a Conviction and when after one; for where it is after a Conviction, you need not be ſo particular; it ought to be alledg'd unlawfully if

before a Conviction, but in this Caſe it may be in the Conviction, ſo that will be well enough; now taking away a Deer, tho' not kill'd, is within the Act, and it cannot receive that Conſtruction of being taken in Toils, for it is taking away quite; if it had ſaid taken away, of which he was convicted, that might have done.

Per Chief Juſtice: Till Proceſs iſſues in Order to diſtrain, he cannot have Corporal Puniſhment, *i. e.* without the Return of the Officer that he has not ſufficient; as to the Truth of Facts, the Return of the Officer is the ſame as a Special Verdict; but if Juſtice of Peace will not believe it, upon Information to the Contrary, perhaps he may iſſue another Warrant. And in Order to come at theſe Facts the Court ordered to bring up the Defendant another Day, and to return the Conviction.

Anonymus, Paſch. 11 *Annæ Reginæ.*

RETURN made to *Ha' Cor'* directed to the Mayor's Court of *Canterbury*, of a Cuſtom in *Canterbury* which ouſted this Court of Juriſdiction, but the Return was defective, and mov'd to mend the Return, and at firſt the Rule was granted *Niſi Cauſa.*

Return which would ouſt the Court of Juriſdiction, refuſed to be amended.

On the Day to ſhew Cauſe, it was inſiſted that it ought not to be amended, and the Court ſet aſide the Rule for the Amendment, becauſe this was to ouſt the Court of Juriſdiction, and by Conſent they were not to proceed below.

A Caſe was quoted, *Preſton* verſus *Goodwin, Trin.* 12 *W.* 3. in the Common Pleas; the Return of *Ha' Cor'* was, that the Demurrer was not joined in ſix Weeks, and Exception taken to this Return, which was defective, and allow'd the Exception, but the Court refuſed to amend the Return.

Per Chief Juſtice *Parker:* This is no favourite Caſe; if this Return were filed now, we muſt grant an Attachment, having not return'd the Cauſe, nor any Excuſe for it, it is

for their ſakes we do not file it; now the Queſtion is, Whether we ſhall give them Leave to mend that we may not know what the Merits of the Cauſe are; this is to ouſt the Court of Juriſdiction, therefore we muſt be ſtrict; Amendments in *Ha' Cor'* of the Crown ſide are allowed and practiſed, becauſe otherwiſe the Officer might on Purpoſe make a defective Return, and then the Priſoner muſt be diſcharged, and therefore we take Care of that before the Writ be filed; you do not make the Return you are required, but you return an Excuſe only; I do not doubt but if the Cauſes were returned, if there were a Slip, the Court would give Leave to amend, and you ſhall ſtill have the Liberty, at your Requeſt, to annex the Return of the Cauſes. If this come down to *Canterbury*, they muſt Judge of it according to their Law; but how can the Mayor determine this Cauſe? it is a Franchiſe of the Corporation; if this Matter concerns themſelves they cannot hold Plea of it.

The Queen verſus *Green, Hill.* 13 *Annæ.*

A Commitment in Execution upon a Penal Statute ought to ſay for how long.

ON Return of *Ha' Cor'* on Commitment upon Act for killing Hares, *&c.* upon Conviction for hunting againſt that Act. And the Commitment appeared to be, until he ſhould be diſcharged by due Courſe of Law, when by the Act he ought to be committed for three Months.

Per Ch. J. *Parker & Cur'*, The Commitment is wrong, let him be diſcharged, for he is now committed in Execution, which is his Puniſhment, and therefore ought to ſay how long, for he is not to pay the 5 *l.* By due Courſe of Law, *per* Chief Juſtice, is when ſome Officer has ſomething further to do, but here it is a determin'd Puniſhment for ſuch a Time. *The Queen* and *Bracy* was ſo, a Commitment *per* Commiſſioners of Bankruptcy in this Manner, when the Act ſays he is to be committed, till he be examined; Dr. *Groenvelt*'s Caſe, *Paſch.* 9 *W.* 3. was ſo, when Commitment ſhould have been till he pay his Fine.

DE
Term. Sanct. Mich.
7 *Annæ Reginæ.*

Mandamus and Returns thereof.

The Queen verſus *Lane.*

Mandamus to reſtore an Alderman of *Glouceſter*; Return, that he wrote a Letter to another Alderman, which was very ſcandalous, and agreed to be a Libel.

Writing a Libel no good Cauſe of Diſfranchiſement before Conviction.

Per Holt & Cur', Tho' never ſo much a Libel, yet there ought to be a Conviction for it; it is indictable at Common Law, and ſo ought to be proſecuted thereon to a Conviction, according to *Bagg*'s Caſe; and held to be no good Return.

At another Day.

THE Counſel urged that it was good without a Conviction, becauſe he agreed the Fact and conſented to be turn'd out; but *per Holt & Cur'*, he can't conſent, becauſe a Libel is a Thing of which they have no Juriſdiction; they have not the Conuſance of the Trial of Libels.

Conſent to be turned out, is not a Reſignation.

Per Holt, If he come to their Aſſemblies, and ſhould by Parol only come and reſign, I hold that is a good Reſignation, if

if enter'd on their Books accepted, but a Conſent to be turned out I can't think to be a Reſignation, and is no Corporate Act.

Counſel made three Diſtinctions.

Cauſes of disfranchiſing before Conviction, or without it.

Firſt, Where the Offence is not indictable, but touches the Point of Office, in ſuch Caſe they have Juriſdiction to remove without Conviction.

Secondly, So likewiſe, where it concerns his Duty and Office, yet mix'd with ſome great Crime, why ſhould they have leſs Authority becauſe the Offence greater; as tearing of Charters and Records of Corporations, that is an Offence indictable, and yet much againſt the Duty of his Office.

Thirdly, Where it has no relation to the Office or Franchiſe, there it is very juſt that they ſhould have no Juriſdiction, as in the Caſes of Perjury and Forgery.

Per Holt, They can't examine an infamous Offence for the Sake of disfranchiſing the Party; nor can you try whether Libel or not Libel, on an Action for falſe Return; but I can't comprehend that this is an Offence againſt the Franchiſe and Duty of his Office. 1 *Sid.* 14. and 1 *Sid. The King* and *Sadler*. *Styles* 477.

DE
Term. Sanct. Mich.
12 *Annæ Reginæ.*

Walker qui tam verſus *Laughton.*

MOTION to amend the Declaration, this being a popular Action upon the Statute of *Uſury*, and the Defendant had pleaded a Plea in Abatement, to which the Plaintiff had demur'd; there were two Faults, firſt was where it ſhould have been *actio accrevit*, the Word *actio* was omitted, and the *toto ſe attingen'* was wrong, and different from the Sums mentioned to be forfeited. Amendment of Declaration in *qui tam* in Uſury, after Demurrer.

Per Cur', All is in Paper, this may be amended. But indeed if there had been ſuch an Amendment as would alter the Action, then we would not allow them to amend, becauſe another Perſon might have brought the Action as you would mend it. Allowed. In what Caſes to be refuſed?

At another Day and Term Paſch. 13 *Annæ.*

THIS Caſe was argued on a Plea in Abatement, but the Objection was to the Concluſion of the Plea, that it did not conclude *tam pro domino Rege quam pro ſeipſo.* This was a Plea in Abatement to the Bill, which may be done, for the Bill is like an Original. *Et inde producit ſectam &c. ſecta* is the Witneſs, *Selden*'s Notes on *Forteſcue:* Pleads that to ſhew there is a Variance between the Writ and Count. Declaration. The Word *Secta* expounded

Chief Juſtice: How comes this Form to be ſo ſacred as not to depart from it? Poſt. 2-8

At another Day.

IT was ſaid, that Suit was the Suit of the Party, and inſiſted ſhould be taken moſt beneficially for the Crown, for this was a Suit for the Benefit of the Crown, and quoted *Gregory*'s Caſe; the Informer can't compound this Suit without the King's Leave; *producit ſectam* is to ſupply the Name of the Witneſs; and it being urged that the Proſecutor may reply without the Attorney General,

1 Salk. Rep. 372.

Declaration need not conclude *tam pro domino Rege quam pro ſeipſo.*

Chief Juſtice ſaid, in *Edward* the Second's Time it was ſo, 17 *Ed.* 3. 48. it ſhould be *Suit bon*, tho' it is printed *Soit bon.* *Fleta* 2 *lib. ca.* 6, 7. 36. 9, 10. 2 *Ed.* 2. 26. 5 *Ed.* 3. 171. 10 *Ed.* 2. 92. Yet this does not affect the Caſe at all; *& inde producit ſectam*, that is his Witneſſes; and you ſay this muſt be for himſelf and Queen, and ſo it is, and the Precedents are both Ways, and there is no Diſtinction between carrying on the Suit, and carrying it on for himſelf and Queen.

Per Cur', Let the Defendant Anſwer over to Day.

Hicks and *Cockup.*

Indebitatus Aſſumpſit lies for Goods ſold from Plaintiff by Defendant.

ACTION on the Caſe, *Indebitatus Aſſumpſit* for Goods ſold from the Plaintiff by the Defendant.

Chief Juſtice: This may be, and if it had been only that he was indebted for Goods ſold, that would have been good; the Plaintiff might deliver Goods to Defendant to be ſold, and if he did ſell, then he promiſed to pay, theſe are Goods ſold from the Plaintiff and by the Defendant; it has been held good, where Plaintiff is miſtaken for Defendant, or Defendant for the Plaintiff.

Per Cur': Judgment *pro quer'*.

The

The Inhabitants of Monks Risborough, Princes Risborough and *Aylesbury.*

Whether an adjourned Seſſions be the next Seſſions on the Statute for Settlements of the Poor.

HERE was an Appeal upon an Order of Removal of a poor Perſon, at an adjourn'd Seſſions, and both Parties appeared; and the Queſtion was, if this was the next Seſſions within the Meaning of the Statute?

Chief Juſtice *Parker:* This ſeems to be within the Reaſon of the Act, it is in Fact the next Seſſions, tho' not ſtrictly in Law, and they have in Fact appeared; it is like the Caſe on the Statute 25 *Car.* 2. for taking the Oaths the next Term; the Lord Chief Juſtice *Holt* was of Opinion, that taking the Oaths the ſame Term was well within that Act. It might be inconvenient to appear at next Seſſions after, his Affairs might not permit him; and in this Caſe it is a prejudice to the Pariſh that keeps the poor Perſon ſo much longer; the great Inconvenience is only in caſe the Party ſhould be ſurpriſed.

Powis: They may not be able to get a Number of Juſtices at an adjourn'd Seſſions, and may be heard clandeſtinely, and nothing is generally done at adjourn'd Seſſions but taking the Oaths; Chief Juſtice *Holt* was of Opinion on the Stat. of 25 *Car.* 2. that if a Man took the Oaths the ſame Term, that was a good taking within the Act; I aſk'd him the Queſtion, and he told me ſo, and ſaid he would never convict one on that Act, if he took the Oaths the ſame Term.

Eyre Juſtice: This is a Caſe of Conſequence; on Stat. *Car.* 2. Oaths muſt be taken either in one Term or the other, they can't be taken in both; an adjourned Seſſions is the preſent Seſſions, the next Seſſions is that which ſucceeds it. Suppoſe an Order of two Juſtices made the Day before the next Seſſions, ſo that they can't Appeal, that would be a hard Caſe, but I can't tell how it would be help'd, this is receiving the Appeal at the ſame Seſſions; it will be proper to ſearch Precedents. *Cur' adviſ.* on this Point. *Hill.* 1 *Annæ Reginæ.*

D E

DE
Term. Paſch.

13 *Annæ Reginæ.*

Newton and *Martin.*

How the Univerſity is to claim Conuſance. Vide *Perne* and *Manners* in 2 Ld Raym. 1339.

Montague for the Univerſity of *Cambridge* claim'd Conuſance; it is a Declaration of this Term, and here is a Warrant of Attorney from the Univerſity to claim Conuſance; firſt the Warrant of Attorney was read, then the Claim, then put in the Charter and the Exemplification of the Statute of 13 *Eliz.* which confirms their Privileges; the Declaration was produc'd, and it appear'd to be a Declaration of this Term. *Clerk* Maſter of the Office ſaid, that they might come any Time the ſame Term to demand Conuſance. No Notice being given, the Court gave till *Monday* to object.

Chief Juſtice *Parker:* You had beſt for the future have an Exemplification of the Record of this Allowance, that for the future you need not be at the Charge to bring up the Charter; this muſt all be enter'd on the Roll, you may do that in the mean While.

DE
Term. Sanct. Trin.
12 *Annæ Reginæ.*

Joſceline and *Laſſere.*

THIS was an Action of Caſe on Bill of Exchange brought againſt the Drawer, and the Bill was to pay 28 *l.* at 7 *l.* a Month, at Monthly Payments, firſt Payment to begin *September* following, out of his growing Subſiſtence.

Draught to pay Money out of growing Subſiſtence, Whether a Bill of Exchange. Ca. in L. & E. 294.

Branthwait: This is no Bill of Exchange, for if he receive no Pay, then he will not be liable; the Court will take Notice of the Cuſtom of Merchants, and if this be not within that Cuſtom, this Court will adjudge them no Bills of Exchange; and there is no Difference when brought againſt the Acceptor, and when againſt the Drawer; ſuppoſe a Bill ſhould be drawn to pay ſo much Money out of his Rents, that would not be a good Bill of Exchange.

Whitaker: This is a good Bill of Exchange, there are three Perſons concern'd in it, which are neceſſary to make a Bill of Exchange; out of growing Subſiſtence, are Words not known in the Law, they are inſenſible, and therefore to be rejected; it is alſo Negotiable, for what makes it ſo, is, its being drawn payable to Order, and is Value received. 2 *Vent.* 308. *Shore* 4, 5. there was a Caſe at *Niſi Prius*, *Parſons* and *Goodwin.* At leaſt this is a good Bill of Exchange againſt the Drawer.

Bill of Exchange need not ſay *Value received.*

Chief Juſtice *Parker:* There is no Neceſſity in a Bill of Exchange of ſaying Value receiv'd. The Queſtion is, Whether this be intended more than a bare Authority? This rather imports that the Drawer had then no Subſiſtence, for it is to be paid out of his growing Subſiſtence; this looks more like an Authority than a Bill of Exchange, and the Action is brought for Non-payment, and not for Non-acceptance.

The next Point will be, if this Bill, as he calls it, or whatever it be, be a good Conſideration for the expreſs Promiſe, for tho' it be ſtrictly no Bill of Exchange, yet if it be a good Conſideration to raiſe the expreſs Promiſe in the *Narr'*, it will be good.

A Man may draw a Bill on himſelf.

Eyre Juſtice: To inſert Value receiv'd in a Bill is not neceſſary; nor is it neceſſary to have three Perſons to make a good Bill of Exchange, for a Man may draw a Bill on himſelf, but it has always been taken to be for a certain Sum, and the Party takes on him to pay at all Events. This is payable out of a certain Fund; ſuppoſe a promiſſory Note of 100*l.* were made payable out of ſuch and ſuch Rents, would that be good? In ſuch a Caſe there muſt be an Averment, that ſuch Rents were received out of which the Bill was to be paid; and there is no Difference here between the Drawer and Acceptor; for ſuppoſe an Action had been brought againſt the Acceptor, would an Action lie againſt him before he had received the Rents? ſure it would not. The other Point, Whether it be a good Conſideration to raiſe an expreſs Promiſe, is conſiderable. If the Subſiſtence do not come in or is contingent, that may be a Reaſon for its not being a good Conſideration.

In this Caſe the Judgment was afterwards reverſed, which had in *C. B.* been given for the Plaintiff in the original Cauſe.

DE
Term. Sanct. Mich.

10 *Annæ Reginæ.*

The Queen verſus *Sir Gilbert Heathcot, Lord Mayor of London.*

MOTION for a *Mandamus* to Lord Mayor to return Sir *William Withers*, and another Alderman and two Common Councilmen, naming them particularly, to the Court of Aldermen, as choſen by the Wardmote, out of which the Court of Aldermen were to * chuſe one to be Alderman of *Broadſtreet* Ward, he is to return two Aldermen and two Common Council.

Whether a *Mandamus* lies to the Lord Mayor of *London* to return to the Court of Aldermen Perſons elected. Ca. in L. & E. 48.

Chief Juſtice: We cannot do that, for there are four at the Wardmote already returned, and ſo indeed there were, for Sir *J. Houblon* and *Lethillier*, *Conyers* and Sir *G. Newland*, were already returned by the Lord Mayor, and they would have Sir *W. Withers* and *Lewin*, Aldermen, and Sir *G. Newland* and Sir *Ro. Bunkly*, Commoners, returned. So held in Caſe of *Fiſhmongers* Company. There cannot be a *Mandamus* to return particular Perſons, no more than there can be to make a particular Rate, for that is to prejudge. Beſides, here being a Return already made of four particular Perſons, if it be a falſe Return, an Action will lie; ſo there is a Remedy; and if he ſhould make a contrary Return, will not that falſify his former Return of his own ſhewing, and make himſelf liable to an Action both Ways?

* This Uſage has been ſince taken away by *Stat.* 11 *Geo.* I. *ch.* 18.

At another Day.

THIS was mov'd again, and it was obſerv'd that in this Way, it was in Effect for the Mayor to chuſe the Aldermen of every Ward, and the Aldermen to chuſe the Common Councilmen.

Richardſon Serjeant, for the *Mandamus:* It is ſurely not in the Power of the Mayor to make what Return he pleaſes; he is the Queen's Officer, as he is the Officer of the Court where he preſides, and the Perſon to be choſen a Juſtice of Peace; the Mayor holds the Wardmote, and is to return four. Neither that Court nor the Court of Aldermen hath Power to compel the Lord Mayor to make a Return, if he ſhould refuſe; and if he did, you would grant a *Mandamus.* If he ſhould make a falſe Return, are the Aldermen bound to chuſe one of thoſe which they know to be illegally return'd to them? *i. e.* not legally elected; they cannot look into the Return, and muſt they chuſe one of thoſe return'd right or wrong? A *Mandamus* is proper to compel him to return the right Four, ſuch as were duly elected, and then the Aldermen may chuſe one. To bring an Action is a round about Way, and tho' no Wrong done to a particular Perſon, yet this Court will give Remedy as in *Bagg*'s Caſe, being a Caſe that concerns the Publick.

Cheſhire ad idem: The Queſtion is, Whether here be not a Failure of Juſtice? The Aldermen muſt be of their own Chuſing; the Lord Mayor is but a Miniſterial Officer, and muſt return thoſe Four who have the Majority. An Action of the Caſe is no adequate Remedy; perhaps every one might have an Action, yet the Damages would be minute.

Attorney General *econtra:* The Lord Mayor is not concern'd in Intereſt, only as a Miniſterial Officer to collect the Votes, and declare which Four have the Majority; he has behav'd himſelf with all the Caution imaginable, for he took Advice about it that he might not do Wrong; ſuch a

Writ

Writ as this was never moved for; it is to make a Return of particular Perſons, and to a Court of Record, as the Court of Aldermen is, who have Authority themſelves; if Return irregular, the Court of Aldermen may examine it, for they have alter'd and ſet aſide theſe Returns, and therefore this Court cannot interpoſe. Suppoſe a Sheriff will not make a Return of a Writ to the Common Pleas, this Court would not meddle in it. Where there is another Judge who has Power to ſet the Matter right, this Court will not meddle, and if there ſhould be a *Mandamus*, the Mayor will certainly return this Matter; and that will put an End to the Writ.

Pratt Serjeant: This Writ was never granted, nor indeed ever mov'd for; the Foundation for having a *Mandamus* is the Neceſſity of the Thing, and where the Party can otherwiſe have no Relief.

At another Day.

THIS Matter was mov'd again. Sir *T. Powis* Serjeant: Suppoſe the Lord Mayor would not hold a Court of Wardmote, or if he would not proceed or take the Poll, that would be a good Reaſon for a *Mandamus*; ſo in this Caſe, when he returns the wrong Perſons. It is agreed he is a Miniſterial Officer, and may be commanded and puniſhed; but now they would have it he is to be puniſh'd by the Court of Aldermen, that is by himſelf, where he preſides, which is very extraordinary; if it be only a doubtful Matter, the Court will grant the *Mandamus*, and the Legality may be debated after.

Solicitor General: By Cuſtom in the City where there is a Vacancy of an Alderman, the Lord Mayor holds a Wardmote, where all Freemen are intitled to come and elect the Alderman for that Ward. Sir *Joſeph Wolf* dying, the Lord Mayor held a Wardmote, and there were ſeveral Candidates; he has returned one right Perſon, *Newland*, but returning three others which were not elected, we pray for this a

Mandamus. On this there was a Scrutiny, but we could not have Juſtice done on that neither. As he is a publick Officer, he ought to ſee every particular Voter to have Juſtice done him.

They ſay here is no Precedent, nor is there any Precedent to the Contrary, that it ever was denied. If there be no other Place to apply to, they ſeem to agree the *Mandamus* will lie; if this were to be rectified by the Court of Aldermen, the Lord Mayor is himſelf Judge there; I believe there is no Inſtance of any Determination of this Nature in that Court. Tho' the Court ſhould not be clear in this, yet the Court has granted *Mandamus* to ſee what the Officer will ſay to it. 1 *Lev.* 121.

This is a Matter of the higheſt Conſequence, ſetting up an arbitrary Power in the Lord Mayor to ſet up Aldermen in every Ward, for Voting, as this Caſe is, ſignifies nothing.

Richardſon Serjeant: As he makes the Return, ſo as Lord Mayor he takes on him to call a Wardmote without the Aldermen. The Court of Aldermen indeed have rejected ſome Returns, as in Caſe of a Perſon returned who is not worth 10000 *l.* ſo where they have returned five inſtead of four, or where three inſtead of four, they have rejected the whole Return, where he returned either more or leſs than Four, becauſe that is againſt the Cuſtom; but that is not like this Caſe.

The Lord Mayor can diſmiſs the Court of Aldermen when he pleaſes, ſo that when this Matter is mov'd before him he takes up the Sword and away he goes; this was *Wood*'s Caſe; beſides, this is an Appeal from himſelf to himſelf.

Carth. 169. Skin. 290. *Cheſhire* Serjeant: In the Caſe of Proctor *Lee*, the Court ſaid, Let a *Mandamus* go, and we will determine whether it lies or no afterwards, and they did hold that no *Mandamus* lay; ſo in the Caſe of one *King*, to be admitted a Fellow of St. *John*'s College in *Oxon*; and the Caſe of Dr. *Bligh* of *Clare-Hall*, *Mandamus* granted. Your Lordſhip will not ſend

us

us from this Court without Relief, unleſs they can tell us where we may have it elſewhere.

Attorney General *econtra:* This is a Queſtion of Right, who had the Majority, and is barely a Queſtion upon the Poll; it was agreed of both Sides to have a Scrutiny, and there was one; the Lord Mayor is not adverſary in this, this was a very tumultuous Election; for they complain'd he did not give the Names of the Poll when the Scrutiny was, but he declared he would adviſe what Anſwers to give to the Objections, and promiſed to declare the Reaſons of his Judgment; he had a Paper in his Hands, and going to give his Reaſons, a Tumult aroſe, upon which he went away to ſecure his Perſon. Tho' the Mayor is not bound to give the Reaſons of his Judgment, and in ſo doing might ſubject himſelf to an Action, as the Caſe of *Aſhby* and *White.* Salk. 10.

But in this Caſe here is no Occaſion for a *Mandamus*, for the Court of Aldermen are not tied down to this Return, for they are to chuſe one out of the Perſons choſen, and not out of thoſe returned and not choſen. This Matter may be regulated by an Act of the Common Council. It was 3 *H.* 4. enacted by the Common Council, that four Perſons were to be nam'd, out of which four the Mayor and Aldermen to chuſe one; now the Lord Mayor only makes a Report as the preſiding Officer, who were elected, and the Court may inquire into the Perſons elected and returned, before they chuſe one, and the Lord Mayor has nothing to do but as a Miniſterial Officer, and only to ſay who had the Majority. There are many Inſtances of the Court of Aldermens rejecting Returns; they have rejected the ſame Perſon three Times ſucceſſively. In *H.* 8th's Time the Mayor returned Five, and they were all rejected; this ſhews that Court has Juriſdiction. There being four returned already, if they return four more, that muſt be nought, for the Four already return'd will not be ſet aſide by that. In 1669 a Return was rejected becauſe of the Inſufficiency of the Perſon, which ſhews they can relieve in ſuch Caſes; that Court has ordered them to proceed to a new Election for divers Reaſons; and once for diſorderly Proceedings a Return was ſet aſide. Whether the Court of Aldermen can give ſufficient Relief in ſuch Caſe.

This

This is a parallel Caſe with thoſe *Mandamus's* to admit or reſtore a Fellow of a College; where they can have Remedy by way of Appeal to a Viſitor, this Court will not grant a *Mandamus*, becauſe the Viſitor is the proper Judge, and they ought to apply to him. Now if they have conſtantly exerciſed this Juriſdiction, we may conclude it was proper to apply to them, and if they had refuſed to redreſs it, there might be ſome Colour, and thei Cuſtoms are alſo confirmed by Act of Parliament. He is alſo ſubject to an Action of every one returned, becauſe one Return contradicts the other; and when eight are returned, which of them muſt the Aldermen chuſe? they cannot chuſe out of both the Returns, they muſt chuſe out of one Four if contradictory, and then which Four ſhall they chuſe out of? and if this laſt Return be not thought Contradictory, then in Effect it is to return eight choſen and elected, which being too many, is the very Caſe wherein the Court of Aldermen have given Redreſs.

Whitaker remembered the Caſe of *Queenhith*; there was an Election which was irregular, and on Appeal to the Court of Aldermen, they were ordered to proceed to a new Election. A Writ of Error, ſuppoſe, is brought in the Sheriffs Court in the City of *London*, and the Sheriff will not make a Return, on Application, the Huſtings will do Right in that Matter.

Lechmere: In all *Mandamus's* to inferiour Courts, they are to command them to proceed to Judgment, but not to give any particular Judgment, nor for or againſt any particular Perſon; now this is to give Judgment expreſly for four particular Perſons; it is againſt the Nature of a judicial Power; if bound to obey, it is no Act of Judgment, but an Act from Compulſion; this Court may as well direct which of them the Wardmote ſhould chuſe, as which of them the Mayor ſhould return.

Powell Juſtice: A Ward is in the Nature of a Hundred, and a Wardmote of a Hundred Court.

Lech-

Lechmere: If he be commanded to return other Four, it cannot be obeyed, becauſe he has return'd a full Number already; they come too late, it is not now in his Power, the Matter is gone from him, he has already executed all the Power he has. He is bound by his Oath not to return above four Perſons, and now he is to be compel'd againſt his Oath and Duty of his Office to return eight. The Franchiſe of the Aldermen is concerned in this Caſe, for they are to chuſe one out of Four, but not one out of Eight. No Inſtance of any *Mandamus* to deſtroy a Franchiſe but to affirm and maintain it, and to leave the Manner to them, ſuppoſing every Court will do their Duty, and not to direct in what particular Manner to exerciſe that Franchiſe. The Caſe of the City of *Oxford*, *Thurſton* and *Slatford*, the Validity of the Clauſe of that Charter, *viz.* no Perſon to be choſe but by the Direction of the Crown, came in Queſtion, and the Court held ſuch Clauſe to be naught. Caſes of Dr. *Witherington* and Dr. *Patrick*, in *Raymond*, were only for granting Adminiſtration generally, and to do Right and Juſtice, but no Direction as to the Manner. *Bagg*'s Caſe is the firſt of a *Mandamus* granted to a Corporation, and few granted from that Time to the Reſtoration. No ſuch Writ as this ever granted even in King *James* the Second's Time. Sir *G. Jefferies* once moved that the Mayor might make a Return, or ſhew Cauſe to the Contrary, but not to return particular Perſons. Caſe of *Selwood*, Rule granted to ſhew Cauſe.

At another Day.

This Matter was moved again in the ſame Term.

Lechmere: BY the antient Conſtitution there was but one to be returned to the Court of Aldermen, but there was a By-law made afterwards to return Four; ſo this *Mandamus* is to inforce a By-law.

Sir *Tho. Powis:* We do inſiſt on it, that it is by antient Cuſtom and Preſcription.

Parker Chief Juſtice: You may return this Matter of the By-law, ſo that is no Objection againſt the *Mandamus*.

Mandamus not grantable where a Man will be liable to an Action for obeying it.

Eyre Juſtice: There is no one Inſtance in the World where a *Mandamus* was ever granted in a Caſe where an Action is given againſt him if he do obey it; I am loath to have this as a Precedent, therefore I am not for its going directly; if the Lord Mayor obey, he is not ſafe, an Action will certainly lie for a falſe Return, tho' he does it in Obedience to the Court. This Writ is not grounded on the Merits of the Caſe, but meerly the Suggeſtion of the Party. Nay, he is liable to two Actions here tho' he obey the Writ, one on the Return to the *Mandamus*, the other by the Court of Aldermen. You cannot compel him to obey the Writ, for he may ſhew Cauſe why he cannot do it; the Difficulty is in making this a Precedent, it will be taken for granted for the future. No doubt Corporations are under the Inſpection of this Court, but that the Right of ſuch Officers muſt be determined by *Mandamus* is not warranted by *Bagg*'s Caſe; there are other Methods to determine the Rights of publick Officers; theſe Writs proceed merely on the Suggeſtion of the Party, and in this Caſe the Mayor is not ſafe in doing the Thing commanded, as he is and would be in other Caſes, if the Party obey and admit, he is not expoſed to an Action.

Chief Juſtice: Suppoſe a *Mandamus* iſſue to an Archdeacon to ſwear in a Church-warden, ſuggeſting that he was duly elected, and the Party ſwear him in, and he is not duly elected, Nobody can bring an Action againſt him, nor can the Court fall on him, he is intirely ſafe.

Eyre Juſtice: The Suggeſtion in all the Writs is *quod cum* ſuch a one was elected, he is commanded to admit, ſo that by doing the Thing, he cannot be liable to an Action; it is in the Alternative, if he do not the Thing, then he is to return a Cauſe, but he is never commanded to return a particular Cauſe, but he is commanded to do the Thing.

At another Day.

THIS Matter was argued again. Mr. Solicitor: The Queſtion is, Whether this *Mandamus* will lie or not? The Objection is, that there was never ſuch a Writ before; can they ſhew me that there was ever ſuch a Caſe before? The Counſel of the other Side do not agree; one ſays the Mayor has a judicial Power, the other ſays he has a Miniſterial only; he is to make a true Return to the Court of Aldermen. What Difference is there between this and an Admiſſion into other Offices? But then it is objected a Return is made. Suppoſe the Mayor of Corporation ſwear in the wrong Perſon, on a *Mandamus* ſhall he ſay he has ſwore in one already? If not legally done, it is nothing at all; as to what is ſaid about the Court of Aldermens having a Power to redreſs this, that is no Argument againſt the Writ, for they may return that to the Writ. In the Caſe of a Viſitor, the Court always grants the *Mandamus*, and then they have Liberty to return that; and when that was ſettled on ſuch a Return that a *Mandamus* would not lie where there was a local Viſitor, then they would not grant a *Mandamus* in ſuch Caſes.

Objected, That it is different from all other Caſes, becauſe the Party cannot obey it without Prejudice to himſelf, becauſe an Action would lie if he obey it; this is no other Objection but what may be made to all other *Mandamus's*, there can be no Action of one Side; he ought not to obey the Writ if not duly elected, nor bound to do it; he will be liable to an Action if he return ſuch as are not elected. Suppoſe a *Mandamus* go to an Archdeacon to ſwear a Church-warden, and there are two Candidates, and he is admitted that has no Right, the other Church-warden who is duly elected may have an Action, for he is the Perſon injur'd, and has Right to the Office, for he is bound to admit him that has Right; Swearing it is true gives no Right, but Giving Poſſeſſion is an Injury. An Action on the Caſe lies againſt an Archdeacon for refuſing to induct a Perſon preſented.

Chief

Chief Juſtice: But ſuppoſe he admit both Candidates, as he may do.

Solicitor General: If Lord in Antient Demeſne refuſe to hold a Court, a *Mandamus* will lie. *Fitzherbert* tit. *Caſe* 46. 1 *Annæ Reginæ* 108. If the Caſe be doubtful only, this Court will grant a *Mandamus*.

Jeffries: Not like the Caſe of a Viſitor, for we have no other Place to go to. In caſe of Prohibitions to the Spiritual Court, if the Caſe be doubtful only, the Court grants the Prohibition, and then determines whether it will lie or no.

Richardſon Serjeant: Court of Aldermen have no Juriſdiction in theſe Caſes, and none can give a Relief adequate but this Court. *Mandamus's* are frequently granted to the City Chamberlain to admit one free of the City, and yet they are ſubject to the Court of Aldermen and under their immediate Direction.

Cheſhire Serjeant: Where the Officer acts indifferently, no Action will lie. Where a Man has a Releaſe he may bring an Action, but he will get nothing by it; the Action ariſes from the Officer's Partiality. This thing happens every Day againſt the Ordinary; two Perſons are ſet up to be admitted by the Biſhop, he can admit but one. A *Jus patronatus* is an Excuſe in Damages; this does not prejudice the Right, all theſe Writs have the Alternative; if the Fact be falſe, he cannot juſtify doing the Thing, no more than not doing it. Where the Contrary is true, no Action will lie with Succeſs, that is the Matter; in other Writs, the Words *ſi ita eſt* is the ſame as to ſhew Cauſe, for Error in Judgment, no Action ſucceſsfully will lie.

Chief Juſtice: Suppoſe the Writ granted, and four more return'd, what is to be done next? Out of which Four will the Aldermen chooſe? Suppoſe croſs *Mandamus's*, which of the four will be thoſe really elected? That Caſe of

of Dr. *Blith*, *Holt* was againſt it, but that was a Caſe of no great Conſequence, this of very great Conſequence, becauſe this will ſet the City in a Flame ; Court of Aldermen may ſay, they are not concerned in the Trial of this Matter, for we think the firſt Four were duly elected and returned, and they may refuſe to elect out of the four laſt, or to elect at all ; then a ſecond *Mandamus* muſt go to the Court of Aldermen, to make their Election. The Caſe of Viſitors depends on the Words of the Charter. If it be a doubtful Caſe, I think the Writ ought to go, but if it be clear, that we are to grant it only to have it quaſh'd afterwards, that will be very inconvenient.

Powis Juſtice : It will make a greater Heat in the City not to grant this than otherwiſe ; I am rather inclined to think this Writ will lie.

Eyre Juſtice : Where an Officer can have Remedy by Aſſiſe or Action, a *Mandamus* is not to be granted, and therefore we are to conſider how this Power of granting *Mandamus's* ought to be exerciſed. I am not ſatisfied that this *Mandamus* to Sir *G. Heathcot* ought to be granted, no Caſe has been quoted that a *Mandamus* will lie, where an Action is given if the Writ be obeyed ; no Action will or ought to lie but for a falſe Return ; if he returns he had admitted and ſworn the Party, that is a true Return and not a falſe one, he would be expoſed here to two Actions ; one Action for a falſe Return to this Court, and the other for a falſe Return to the Court of Aldermen, one cannot be pleaded in Bar of the other ; there is no Precedent in this Caſe, nor does any other Caſe come up to this ; the Caſe of *Abingdon* comes neareſt to this Caſe.

The Queen verſus *Sir G. Heathcot.*

At another Day in the ſame Term, the Court gave Judgment in this Matter.

Eyre Juſtice: THE Lord Mayor always preſides at the Wardmote, and has returned four Perſons as elected. It is agreed the Court of Aldermen have quaſhed Returns, in particular, for want of Qualifications, as not having 10000 *l.* and for diſorderly Practices at the Elections; that they are to chuſe one out of the Four, and have the final Determination. This Court has a Power to compel all Perſons in publick Stations to do their Duty in relation to Elections; but whilſt they relieve one Man they muſt not prejudice another, and muſt always take Care that the Remedy be effectual. *Bagg*'s Caſe gives no direction how to execute that Power, nor does the *Mandamus* Act affect this Caſe at all, it not being within that Statute. Nor is there any Precedent in the Caſe for this *Mandamus*; we are therefore to determine this Caſe from the Reaſon of the Thing; the common Caſe of *Mandamus* to Archdeacon to ſwear Church-warden, and to Corporations to admit Members, do not come up to this Caſe, becauſe this *Mandamus* is liable to great Inconvenience, which is the principal Thing to be conſidered in this Caſe for the Exerciſe of this Power. In other Caſes if the Party obey the Writ he is perfectly ſafe, but here by his Obedience he is expoſed to an Action, and the Command of this Court is no Defence to him, for the Suggeſtion in the Writ is not the Opinion of the Court, but the mere Suggeſtion of the Party. In the Caſe of a *Mandamus* to the Archdeacon, if the Party obey, no Action will lie. A *Mandamus* is not, *ſi ita ſit*, but leaves it to the Election of the Party to obey or make a Return. No Action can be brought by him that has a Right againſt the Archdeacon for admitting one who has no Right. Suppoſe the Lord Mayor make this Return, then he is expoſed to a double Vexation, to be puniſhed in double Damages, and one Action cannot be pleaded in Bar of another. But

in the next Place this *Mandamus* will be ineffectual, becauſe the Right of the Parties cannot be determined on this *Mandamus*; ſuppoſe it ſhould be found for theſe four in the Writ, this will not make them the Candidates before the Court of Aldermen, and you muſt afterwards have a *Mandamus* to the Court of Aldermen to elect one, and admit him, and they are not concluded by that Trial between other Parties.

Nor is this the proper Remedy, there ought to be one, no doubt. The Caſe of *Abingdon* points out the Remedy, for there were two to be elected by a ſelect Number, and the Mayor and Bailiffs to chuſe one, and the *Mandamus* was not granted to the ſelect Number, but to the Mayor and Bailiffs to admit and ſwear. Now in this Caſe the Aldermen are to admit and ſwear.

Caſe of *Abingdon.*

Vide *The King* verſus *Sir J. Ward, Paſch.* 5 *Geo.*

Nor is the Return of the Lord Mayor concluſive in this Caſe.

DE
Term. Sanct. Hill.

13 *Annæ Reginæ.*

Mitchell and *Reynold.*

Bond in Reſtraint of Trade may be good on a particular Conſideration which is reaſonable.

Ca. L. & E. 27, 85, 130. 1 Will. Rep. 181.

DEBT on Bond, Condition, that he nor his Aſſigns ſhould keep a Victualling Houſe, or vend Liquor therein, or in any other Place, within a Mile of *Roſemary-lane* during Twenty-one Years ; Conſideration was, the Plaintiff had aſſigned his Intereſt in this Houſe, then a publick Houſe, to the Defendant.

Chief Juſtice *Parker* delivering the Opinion of the Court.

The Queſtion is, Whether theſe Bonds in Reſtraint of Trade are good or void? We are all of Opinion they are good, if they are grounded on a ſpecial Conſideration ſet down in the Bond, which makes it a reaſonable Contract, and the true Diſtinction is not between a Bond and a Promiſe, but between Contracts, whether by Bond, Covenant or Promiſe, on ſuch a Conſideration as makes them reaſonable and uſeful, and ſuch Contracts as are without any juſt Reaſon or Conſideration ; where no particular Conſideration is to ballance the Reſtraint of Trade, thoſe are void, in what form ſoever the Contract appears.

Yet there is this Difference between Bonds, not to ſet up Trade in a particular Place, and not to ſet up a Trade generally in any Place ; ſuch are void, not becauſe one is a Bond and the other a Promiſe, but becauſe nothing appears in the one but a bare Reſtraint of Trade, which may be of no Uſe of one Side, and ſerve only the Purpoſe of Oppreſſion.

I remember the Caſe of one *Clerk* a Taylor of the City of *Exeter*, who gave Bond not to ſet up a Trade in any Part of that City; this Bond was held to be void in the Exchequer Chamber. *Vide* 3 *Lev.* 241.

The Caſe of *Dowers* and *Wrench* was determined *Paſch.* 12 *Annæ Reginæ*, according to the Reſolution in the principal Caſe.

DE
Term. Sanct. Hill.

13 *Georgii* I. In the King's Bench.

Cheeſman and *Ramby.*

BOND with Condition not to ſet up Trade within Half a Mile of the Plaintiff's now Dwelling Houſe, or any other Houſe that ſhe, her Executors or Adminiſtrators ſhall think fit to remove to, to carry on the Trade of a Linen Draper, nor inſtruct or aſſiſt any other under any Pretence whatſoever; this was in Conſideration that the Plaintiff was to take the Defendant's Wife as a hired Servant to her, to aſſiſt her in the Trade of a Linen Draper for three Years without any Money, whereas ſhe did reaſonably deſerve 100*l.* with ſuch a Servant; this was a Bond for 100*l.* only with Condition to pay 100*l.* only in Caſe the Condition was broken. The like Reſolution.

The Defendant having been taken in as a Servant without Money, where a conſiderable Sum might be reaſonably expected.

On a Writ of Error out of the Common Pleas, Judgment affirmed for the Plaintiff; this is a good Conſideration for this Bond, taking a Servant without Money, and in Effect was no more than an Agreement to pay what ſhe ought to have paid at firſt, in Caſe ſhe ſet up Trade, and does not amount to a general Reſtraint, becauſe it extends to Executors and Adminiſtrators; yet if it did, the Breach aſſign'd was that the Defendant did inſtruct her Husband in the ſaid Trade, *&c.* and a Bond may be good as to part of the Condition, and void as to the other part, being at Common Law. *Vide Norton* and *Sims*, and the Court relied on the Caſe of *Mitchel* and *Reynolds*, ſolemnly reſolv'd *Hill.* 11 *Annæ Reginæ*, and *Dowers* and *Wrench*, *Hob.* 12.

Bentley verſus *Epiſcopum Elien'*, in B. R.

Of the Power of Viſitors.

IN Prohibition, the Plaintiff declared that *H.* 8. 19 *December* in the thirteenth Year of his Reign founded *Trinity* College in *Cambridge*, and that his Succeſſor Queen *Elizabeth* made a Body of Statutes, the 40th whereof is intitled *De Magiſtri ſi res exigat amotione*, and ſpeaking of the Biſhop of *Ely* there are the Words *Corrigat*, *puniat*, *expellat.* That he was cited to appear before the Biſhop as ſpecial Viſitor, appointed by the ſaid 40th Statute of *Eliz.* to anſwer to 64 Articles which are inſiſted upon as Violations of the Statutes, ſome of which are long before the laſt Act of Grace, and others of them are for ſetting the College Seal in Conjunction with the Fellows.

The Biſhop for a Conſultation ſets out a former Statute of *Ed.* 6. in theſe Words, *Viſitator Epiſcopus Elienſis ſit*, and avers that he is Viſitor General, and as ſuch has a Right to proceed upon the Articles.

The Doctor put in an immaterial Replication, to which there was a Demurrer, and after ſeveral Arguments, theſe Points were ruled.

First, That tho' ſeveral of the Facts charged, appear to be before the Act of Grace, yet they are not pardoned by that Statute, but are ſtill inquireable by the Viſitor. There are two Sorts of Corporations, firſt, Thoſe that are for publick Government; ſecondly, Thoſe that are for private Charities: The firſt of theſe are govern'd by the Common Law, but the Second is the Creature of the Founder, and govern'd by his private Laws; not that the particular Perſons are exempted from the Common Law, but the Body in general is: And as theſe are private Laws they are in the Nature of Truſts, and the Breach of them is no Crime Cognizable by the Common Law.

They are firſt for publick Government; ſecondly for private Charity, Difference between them.

The King's Power of pardoning ariſes from his having the executive Power in him, and tho' in this Caſe the King is Founder, yet the Breach of his private Statutes are not Crimes againſt the Crown: The Crimes pardoned are ſuch as are againſt the publick Laws and Statutes of the Realm, whereas thoſe are in the Nature of Domeſtick Rules, for the better ordering of a private Family.

Secondly, That tho' ſeveral of the Crimes imputed to him for Violations of the Statutes of the College appear to be done by him in Conjunction with others, yet that is no Reaſon to exclude the Inquiry of the Viſitor; ſuppoſe the whole Body ſhould join in ſetting the Seal to a Deed to encourage a Murder, would they not be ſeverally puniſhable in their natural Capacity? If he was not concurring in the Act, and it is only as to him a virtual Conſent, as included in the Body, that will be proper Matter of Excuſe: If a Power is lodged in two or three Juſtices, and they abuſe it, are they not ſeverally puniſhable for it? Their being Corporate Acts therefore is no Ground for a Prohibition.

Corporate Acts examinable by the Viſitor.

Thirdly, That by the Statute *Ed.* 6. the Biſhop of *Ely* and his Succeſſors are appointed general Viſitors, it being *Epiſcopus Elienſis*, without any Chriſtian Name, according to the Caſe 15 *H.* 7. 1. *b.* Powers in Acts of Parliament given to Biſhops

Power to Succeſſors, how given in Acts of Parliament.

Biſhops or Juſtices, will veſt in their Succeſſors without the Words *for the Time being*.

When the Crown has appointed a general Viſitor, it cannot afterwards enlarge his Power.

Fourthly, That tho' the three former Determinations are in Favour of the Suit below, yet the Prohibition ought to ſtand, becauſe the Biſhop has not cited the Doctor upon the foot of his general Viſitatorial Power, but as a ſpecial Viſitor appointed by the 40th Statute of *Eliz.* which the Court ſaid he was not. For being before appointed general Viſitor, there remained no farther Power in the Crown, with Regard to enlarging the Viſitatorial Power. They ſaid it was a Queſtion they would not determine, whether when the Crown has given Statutes and appointed a Viſitor, the Succeſſor can any way alter or adnul the former Statutes: The Practice indeed has been otherwiſe, but it had never been determined to be good: For this laſt Reaſon they were all of Opinion, that the Prohibition ought to ſtand, and gave Judgment accordingly.

This Judgment was afterwards reverſed in the Houſe of Lords upon a Writ of Error, and the Prohibition was ordered to ſtand as to many, and a Conſultation awarded as to others of the Articles exhibited before the Biſhop againſt the Doctor, and the Biſhop was ordered to pay the Doctor 100 *l.* for his Coſts.

DE
Term. Paſch.

4 *Georgii* I. In the King's Bench.

Settlement of the Poor.

The Inhabitants of Horncaſtle and *Boſton.*

THE Queſtion was upon the Certificate of the Pariſh which is to be ſign'd by the Church-wardens and Overſeers of the Pariſh, and to be atteſted by two Witneſſes, and to be allowed and ſubſcribed by two Juſtices of the Peace.

Atteſtation by Juſtices of a Certificate for Poor, doth not import their Allowance of it.

It was ſign'd, ſeal'd and deliver'd in the Preſence of *S. H.* Mayor, and *Thomas Maſcal*, and it appeared he was a Juſtice of Peace; the Queſtion was, Whether this Atteſting by the Juſtices was Allowing?

Per tot' Cur': Held no good Certificate, for, Juſtices ought to allow, and theſe are only Witneſſes here to the Execution, and it is no Mark of their Approbation, which is Matter of Judgment.

The Inhabitants of Almonsbury and *Hodſfield in Yorkſhire, Trin.* 4 *Geo.* I.

AN Appeal was made to Seſſions againſt an Order of Removal, and not ſaid by whom the Appeal was made: An Objection was made, that this was a limited Juriſdiction,

An Appeal to Seſſions, not ſaying by whom, allowed.

diction, and it ought to appear by whom Appeal was made; yet becauſe there were ſeveral Precedents this way, tho' four to one of the Contrary, and not to overturn a great many Orders, (for the Clerk reported that moſt of thoſe from Weſt-riding of *Yorkſhire* were ſo) for this Reaſon only the Court did confirm this Order.

Why.

The Inhabitants of Bodington and *Barwell.*

Statute for Year's Service to gain Settlement, has no Retroſpect.

SEttlement as hired Servant, and ſerved for ſix Months only; then comes Stat. 8 & 9 *W.* 3. that enacts and declares, that they ſhall ſerve for a Year.

Per Cur': This Act ſhall have no Retroſpect; and a Caſe quoted of *Trin.* 11 *Anne*, *Beckwell* and *Camberwell.*

The Inhabitants of Mereſly and *Granborough, Trin.* 4 *Geo.* I

Settlement, by what Eſtate gained?

A Woman was intitled as *Ceſtuy que Truſt*, to the Truſt of a Term of 99 Years, for her Life only, of two Rooms, *&c.* the reſt of the Houſe being ſet by her for 21 Years, and ſhe marries: And *per Cur'*, this Man has a good Settlement; and the Caſe of *Riſlip* and *Harrow* remembered, which was a Copyhold for Life of 25 *s. per Ann.*

And *per Cur'*: The Act was meant of thoſe who went from one Pariſh to another, to rent Tenements under Value, not of ſuch as had them; and if you cannot remove him, he is ſettled. Theſe are Synonymous.

The Inhabitants of Weſtwood-Hay, Trin. 4 *Geo.* I.

THE Queſtion was, Whether Hiring from the Statute Fair after *Michaelmas* to *Michaelmas*, was good Hiring? *Paſch.* 1 *Geo.* 1. Hiring from the third of *October* to *Michaelmas* following, held no Hiring for a Year; ſo *The King* and *Inhabitants of Horton*, if no Fraud appear it is not an Hiring; if a Man wants a Day of Age it is all one as if he wanted a Year; the Order was quaſh'd.

What not a good Hiring for a Year. *Sett. and Rem.* 80.

The Inhabitants of Freeport, Trin. 4 *Geo.* I.

AN Order of Seſſions for one Pariſh to relieve another Pariſh in the ſame Hundred, quaſh'd, for the Seſſions have Power only when out of the Hundred, and two Juſtices when in the ſame Hundred.

Order for one Pariſh to relieve another, by whom to be made.

The King and *Munday, Trin.* 5 *Geo.* I.

AN Order made for Husband, *Munday*, to maintain Wife's Mother, and Order made againſt both Man and Wife; it appeared by the Order that the Husband had conſiderable Effects with his Wife, and that her Mother fell into Poverty after the Marriage.

A Man not obliged to maintain his Wife's Mother. *Sett. and Rem.* 91.

Per Cur': Order quaſh'd, becauſe the Son-in-Law was not within the Act of Parliament, and the Wife cannot be of Ability, becauſe her Eſtate is a Gift to the Husband, and he is a Purchaſer for a valuable Conſideration; and they ſaid it would be Inconvenient if the Wife ſhould have Children by a former Husband.

Neither is the Wife.

The

The Inhabitants of White Waltham and *New Windſor, Trin.* 5 *Geo.* I.

The Pariſh which gave a Certificate to Perſons as Man and Wife and their Children, not allowed afterwards to controvert the Marriage.

AN Order to remove *Anne Piſſey*, Widow of *John Piſſey*, and ſix of the Children of ſaid *John Piſſey* by his ſaid Wife, and ſo names them, to Pariſh of *White Waltham*; and on an Appeal brought by that Pariſh, it appeared that they cohabited as Man and Wife two Years in the Pariſh of *White Waltham*, and then got a Certificate in 1702, from *White Waltham* to the Pariſh of *New Windſor*, whereby they undertook to receive again the ſaid *John Piſſey* and his Wife and Family, when ever he or they ſhould become chargeable, and they went into the Pariſh of *New Windſor* and there cohabited as Man and Wife, till Death of *John Piſſey*, which was a little before the Order of two Juſtices, and Children were born in *New Windſor*, and Chriſtened there by the Name of *Piſſey*; and then goes on and ſays, And it further appearing on Oath of ſaid *Anne Piſſey*, that ſhe was never married to the ſaid *John*, and that therefore ſaid ſix Children are Baſtards, and ſo they diſcharged Order of two Juſtices.

Per Cur': Quaſh the Order of Seſſions, for the Pariſh which gave Certificate is bound by it, and cannot diſpute the Marriage after having allowed them to be Man and Wife, and Baſtard Children are not within the Act, for tho' the Act ſays, Shall receive back his or her Children, yet in Law they cannot be either Children of Father or Mother, if Baſtards, and the Certificate is given to indemnify the Pariſh.

The Inhabitants of Biſham and *Cookham, Hill.* 7 *Geo.* I.

Annual Office gains a Settlement.

ONE was a Collector of Taxes for Births and Burials, which extended to ſeveral other Pariſhes; held it did make a Settlement in the Pariſh where he lived, and within

in the Words of 3 & 4 *W.* & *M.* who ſhall on his own Account execute any publick annual Office or Charge in the Pariſh during a Year; and quoted the Caſe of *St. Mary* and *Inhabitants of St. Lawrence.*

The King and *Inhabitants of Iſlip, Paſch.* 7 *Geo.* I.

ONE *Wilſon* was by one *James* taken into the Pariſh of *Iſlip* for a Year, from *Michaelmas* to *Michaelmas*; in the Year he was ſick for about ſix Days, and abſent from his Maſter's Houſe four Days, to ſee his Mother who lay ſick, without his Maſter's Leave, and three Days before the End of the Year he asked his Maſter Leave to go to *Biſceſter* Statute Fair, to be hired for the next Year; but he refuſed to give Leave, and ſaid if he did go, he ſhould go for good and all, and he would deduct 6 *d.* a Day for his Wages for the three Days; but the Servant denied to conſent to any ſuch Deduction, and ſaid he would ſerve out the Year, but agreed to deduct for his Sickneſs 6 *d.* and for his four Days Abſence 6 *d.* more, and the Maſter paid him his Wages all but the 2 *s.* and 6 *d.* deducted as before. Thereupon he did go to *Biſceſter*, and did not return after; the Maſter twice at different Times during the ſaid Year, told the Servant that he ſhould not have any Settlement at *Iſlip*; this was an Order of two Juſtices to ſend him to *Iſlip.*

Whether a Year's Service good, where ſome Days are wanting, upon particular Reaſons, as Sickneſs, going to ſee a Parent, going to be hired.

Per Cur', Affirm the Order of Appeal, for the Sickneſs is the Act of God, and that will not make him ceaſe to be a Servant; and going to ſee his Mother, was his Duty, and it was a ſmall Neglect, and the Maſter received him again; as to three Days before the End of Service, it is well enough, it was reaſonable to go to be hired, he ought not to have been denied, and he would not conſent to go away. But beſides it is apparent Fraud in the Maſter, and done to prevent a Settlement, for, he declar'd twice he ſhould not be ſettled. So *per Cur'*, he is ſettled in *Iſlip.*

The King and *Inhabitants of St. Mary Colechurch and Ratcliff, Trin.* 3 *Geo.* I.

A Man is an Inhabitant where his Bed is. *Sett. and Rem.* 79.

A. Was bound Apprentice to a Seafaring Man, and ſerv'd him for a Quarter of a Year, in the Day Time on Land, in St. *Mary Colechurch*, but lay every Night on Shipboard in *Ratcliff*; the Juſtices ſend him to *St. Mary Colechurch*, where the Service was; the Order quaſh'd.

Per Cur': A Man properly Inhabits where he lies; as where an Houſe is in two Leets, he is to be ſummoned to that in which his Bed is.

Rex verſus *Reed, Hill.* 13 *Geo.* I.

Poors Rates.

THE Defendant being a Diſſenting Miniſter, was rated upon 43 *Eliz.* as Occupier of a Meeting-Houſe; the Order was quaſhed.

Mayfield and *Heathfield, Mich.* 12 *W.* III.

Order of Juſtices, quaſhed at Seſſions, cannot be quaſhed alſo in *B. R.*

AN Order for removing *Elizabeth Andrews* and four Children from *Mayfield* to *Heathfield*; on Appeal an Order of Seſſions was made, making mention of the Woman and her four Children, and it diſcharged the Order of the two Juſtices; it was moved by the Pariſh of *Mayfield* to quaſh their own Order of two Juſtices, becauſe naught, for not ſaying her Children; but *Holt* would not quaſh the Order of the Juſtices, becauſe it was vacated by the Juſtices in Seſſions, he held it was naught; but the Order is now gone: And ſo confirmed the Order of Seſſions. The Order of Seſſions only quaſhed the Order of two Juſtices, but no other Adjudication in order to ſend them to *Mayfield*.

The King verſus *Pariſh of Bakewel in Derbyſhire,* 12 *W.* III.

Order of Removal ſhould ſay *laſt* Settlement.

AN Exception was taken by *Parker* to an Order of Seſſions which was to remove a Child to the Place of his Mother's Settlement, and it ſet forth he was an Infant, but did not ſay his laſt Settlement, and tho' he was an Infant, yet he might gain a Settlement of himſelf; the Order was quaſh'd.

The King verſus *Saxmundham,* 12 *W.* III.

Child of former Huſband, where to be ſettled.

A Child of a former Husband, where a Woman is married to another, tho' but a Year old, cannot gain a Settlement where its Mother goes with the ſecond Huſband, but only ſhall go there for Nurture, but muſt be maintained by the Pariſh where the Child's Father had a Settlement. So if a Baſtard.

Inhabitants of Spittlefields and *St. Andrews Holborn.*

Birth *prima facie* gains a Settlement.

TWO Juſtices ſend a Child to *Spittlefields* as the Place of its Birth, neither Father or Mother having a Settlement; and on Appeal, the Juſtices at Seſſions were of Opinion, that Birth gains no Settlement but only in Caſe of Baſtardy, and Child to be at the firſt Place till they find a better.

Per Cur': Abſente Holt, Birth makes a good Settlement, and the Labour lies on them where it was born, to find another. The Order made on the Appeal was quaſhed.

Inha-

Inhabitants of Kentis-Beer and *Halberton.*

THE Order recited that *Halberton* had Notice, and that *Kentis-Beer* profecuted the Appeal, but the other did not appear, and fays that it not appearing that the poor Perſon *Margaret Sheer* was ever ſettled in *Kentis-Beer.* The Court diſcharged the Order; *per Holt*, I put it on the Overſeers not appearing, they have made Default; to what Purpoſe was it to give Evidence, when No-body was there to defend? ſo the Order of Seſſions to be affirmed.

Inhabitants of Silveſter and *Aſhton.*

Service for a Year, Part in one Pariſh, Part in another, Settlement in the laſt.

AN Order was made for removing one *Elizabeth Coleman* who was hired into *Aſhton* for a Year, as a Servant, and ſerved there ſix Months, and then the Maſter removed into *Silveſter*, and there ſhe ſerves out the Year.

The Queſtion was, where ſhe was ſettled? And *per Cur'*, She was ſettled at the laſt Place.

Holt C. J. She could not be ſent from her Service, before the Statute; if ſhe was hired for a Year and ſtayed there forty Days, ſhe was ſettled. A Man is hired into every Place his Maſter goes where he ſtays 40 Days, for, he is hired to ſerve him the whole Year; ſuch Service is Service for a Year on the ſame Contract, and Continuance was to be forty Days; for, then he could not be removed; and there is no Difference between unremoveable and ſettled. The Caſe of one *Edgar* who had a ſmall Copyhold, his Children could not be ſent away, and if he could not be ſent away, he was *eo nomine* ſettled.

Caiſter and *Eccles*, 1 Ld Ray. 683.

Eyre J. quoted a Caſe of an Apprentice, *Caiſter* and *Eccles*, he ſerved Part of his Time in one Pariſh, and Part in another; and adjudged, ſettled in the laſt Place.

Inha-

Inhabitants of New Elm, Oxon.

RENting a Windmill of 10 *l. per Annum* is renting a Tenement of 10 *l. per Annum.*

Windmill is a Tenement to make a Settlement. *Sett. and Rem.* 4.

And *per Cur'.* This is a good Settlement.

The Inhabitants of Antony and *Cardenham, Cornwall.*

A Widower had a Daughter who was married into another Pariſh and there ſettled, he hires himſelf into a Pariſh.

Where a Widower may gain a Settlement by Service tho' he has a Child? *Sett. and Rem.* 5, 29.

Per Cur'. It is a good Settlement, for it is within the Meaning tho' not the Letter of the Act; if any unmarried Perſon not having a Child, and he has none to the Purpoſe intended by the Act, *i. e.* that can be chargeable; ſuch Caſe was before adjudged *per Powell* and *Eyre* at *Dorcheſter.*

The King and *Inhabitants of Ailesbury.*

PER *Holt & Cur'.* Let it be a ſtanding Rule, that no *Certiorari* go to remove an Order of two Juſtices, till the Matter be determined on Appeal; and if they do, yet a *Procedendo* may go. The Inconvenience is, a *Certiorari* ſtops Proceedings, and then if the Order be good in Form, it is confirm'd, and the Party fix'd for ever at that Place; for this Court cannot meddle with Matter of Fact; and there is no Remedy after, becauſe the next Quarter-Seſſions is over.

Certioraries to remove Orders of Settlements.

The King and *The Inhabitants of Harrow and Edgware.*

Freehold or Copyhold gains a Settlement for a Man and his Children tho' born before.

ONE had ſerved as a Covenant Servant in *H.* and after was admitted to a Copyhold on the Waſte of 25 *s. per Annum*, for his Life in the Pariſh of *E.* he is ſettled at *E.* and his Children with him there, tho' ſome born before Admiſſion. If a Man have never ſo ſmall Freehold he cannot be removed; it is the ſame of Copyhold, if for Life, and if he cannot be removed, he is ſettled; theſe are ſynonymous Terms.

The Inhabitants of Rudgwick, Chiddingfold and *Dunsfold.*

Service to gain Settlement muſt be on one Contract. *Sett. and Rem.* 2.

THIS was Hiring for one Half Year, after that a Hiring for another Half Year.

Per Cur': It is no legal Hiring within the Act; if this be allowed, where to ſtop. They may hire Day Labourers, it is not like the Caſe of renting 5 *l.* a Year and 5 *l.* a Year, that is 10 *l. per Annum*, and good, for he is Tenant to 10 *l. per Annum*; but Hiring for Half a Year, and then Hiring for another Half Year, theſe are two ſeveral Contracts, ſo not good; Service for a Year muſt be on the ſame Contract, and one Service for Year; but if there ſhould be an Hiring for a Year except a Day or Two, it would be fraudulent.

The Inhabitants of St. Lawrence in Reading.

What Office or Tax gains a Settlement. *Sett. and Rem.* 3.

THIS was one elected into the Office of Warden for the Borough of *Reading*, but exerciſed it in the *Pariſh.*

Per Cur': It is a good Settlement; for tho' it be not a Pariſh Office, yet if publick Annual Office, as here, which

is in Nature of a Tithing-Man, it gains a Settlement: But in the Caſe of a Tax, it muſt be a Parochial Tax. The Office of a Conſtable (tho' he is choſen by the Leet) exerciſed in a Pariſh, is a Settlement; but if he be a Deputy only, it is no Settlement. A Rate to the Scavenger, where it is extended to the Ward, is not good to make a Settlement.

Inhabitants of Wiſhford and *Bretford, Wilts.*

Sarum, Lent Aſſizes 1712.

A Perſon five Days after *Michaelmas* 1709, was hired unto *B.* from the ſaid five Days after *Michaelmas* 1709 to *Michaelmas* 1710, and on *Michaelmas* 1710 he departed from his Maſter and Service, and was paid his Wages to that Time; and on the next Day after his Departure, he returned and Covenanted with his ſaid Maſter, to ſerve him there for another Year, but a Month or five Weeks before the End of the laſt Year the Servant departed from the Service, and entered on another Service, and the Maſter deducted out of the laſt Year's Wages 8 *s.* for the Month or five Weeks that was wanting of the Year; this was held *per Powis*, Judge of Aſſize, to be no Settlement, becauſe here is no Hiring for an intire Year, nor Service for a Year purſuant to the Hiring.

Hiring, and Service for a Year neceſſary to gain a Settlement.

Riſlip, Hendon and *Harrow*, &c.

ONE born at *Hendon* ſtaid there till eleven Years old, then is put to board at *Riſlip* for a Year, then comes back to *Hendon* where he has two Acres of Freehold deſcended on him of 4 *l. per Annum*; he lives there two Years and Half, then goes to *Pinnar*, and boards there two Years; then goes to *Harrow*, ſtays there two Years, then takes a Houſe and gets a Licence of Juſtices to ſell Ale; *Harrow*, by Order, ſends this Man to *Hendon*, and on Appeal that Order was diſcharged, and the Man ſent back to *Harrow*; then *Harrow* ſends him to *Riſlip*, and on Appeal the Order is con-

Settlement not gained by boarding.

confirmed, then *Riſlip* ſends him to *Hendon*, and it was moved to quaſh this Order.

Per Cur': Taking of Boarder to School will not make him an Inhabitant, for he has his Maintenance elſewhere; the ſame of a Nurſe Child; one put to board is no Sojourner within the Act; Sojourning is the Act of a free Mind, but putting to board perhaps is not, and the Juſtices by their Licence cannot make a Settlement.

Or Licence to ſell Ale.

Holt C. J. The Order between *Riſlip* and *Harrow* is concluſive, and infers a Settlement till quaſh'd; and this makes the Order from *Riſlip* to *Hendon* naught, becauſe adjudged he was ſettled before at *Riſlip*; and the Juſtices have executed their Authority; *Hendon* is diſcharged by the firſt Order being quaſh'd.

A Freehold a good Foundation for a Settlement.

And *per Holt*, If Man hath a Freehold, tho' Nobody is in Poſſeſſion, and tho' never ſo well ſettled in another Place, he may come where his Freehold is, tho' but two Acres. The Legiſlature never intended to baniſh a Man from his Freehold, tho' there be no Houſe.

The Inhabitants of Whitley and *Theerſley*, *Trin.* 3 *Annæ.*

Apprentice, how to be diſcharged.

A Son of Twenty-one Years of Age was bound an Apprentice to his Father for ſeven Years, and ſerved him for two or three Years, and they part by Conſent; the Father diſcharged his Son and delivered him his Indenture, but did not cancel it, and he lived as an hired Servant in another Place; and he was adjudged by the Juſtices to be ſettled where he was an Apprentice.

Per Holt C. J. If the Seal had been tore off, he had been diſcharged.

The

The Inhabitants of Coxwell and *Shillingford, Hill.* 4 *Annæ.*

PER *Holt* C. J. The Birth of a Legitimate Child does not make a Settlement, but the Place of the laſt legal Settlement of the Father; one born or drop'd in a Place where a Perſon is Vagrant, gains no Settlement where drop'd, but where the Father was laſt legally ſettled.

Settlement, when not gained by Birth.

The Inhabitants of St. Paul and *Farringdon, Trin.* 7 *Annæ.*

AN Order was made by two Juſtices on the Pariſh, to pay 25 *s.* to a Surgeon, for curing the Leg of a Sick poor Perſon.

Per Holt C. J. This Order is naught, and muſt be quaſh'd; becauſe it does not appear that the Church-wardens and Overſeers did employ the Surgeon, and if they requeſt a Surgeon to do it, an Action will lie againſt them, and then Church-wardens and Overſeers may apply to Juſtices to make an Order to reimburſe them. The Order was quaſh'd.

The Inhabitants of Southwell and *Sneedon in Nottingham, Mich.* 10 *Annæ.*

AN Order of Removal of a Baſtard Child to the Place of its Birth, ſaid that a certain Woman was brought to bed at *Sneedon* of a Baſtard Child, and ſhe came immediately and drop'd it in the Pariſh of *Southwell*, there to be chargeable to the Pariſh, and ſhe cannot be found, tho' Endeavours have been uſed for that Purpoſe; therefore it was removed from the Pariſh of *Southwell* to the Pariſh of *Sneedon*, that being the Place of its Birth.

An Order quaſhed for want of ſaying the Child *of a Perſon unknown.*

Per Cur': The Order was quaſh'd becauſe they have not named the Woman. Chief Juſtice, They muſt either Name her, or ſay, that ſhe is a Perſon unknown, as you ſay in an Indictment for ſtealing Goods of a Perſon unknown, *bona cujuſdam ignoti*, but they need not ſay Wife or Widow, *&c.*

The Inhabitants of Sandridge and *Luton*, *Hill.* 12 *Annæ.*

The like Reſolution.

AN Order for Removal of a Baſtard Child, ſaid that a Baſtard Male Child about three Months old was brought into *Sandridge*, and that ſuch Child was a Baſtard, and born in, and ſo ſettled in *Luton*; I objected, they did not Name the Mother, nor ſay *unknown*, and quoted the Caſe above of *Southwell* and *Sneedon*, and it was held a good Exception, and the Order was quaſhed.

The King verſus *Inhabitants of Risborough Green*, *Mich.* 12 *Annæ.*

A Woman doth not loſe her Settlement by marrying a Man who hath none.

A Woman was ſettled at *A.* and married a *Scotchman*, who by no Poſſibility could have a Settlement in *England* (as the Caſe was), and therefore the Woman returned to her firſt Settlement at *A.* where ſhe was ſent and ought to remain.

The Inhabitants of Wolverton and *Solden*, *Hill.* 13 *W.* III.

Order quaſhed for not purſuing the Words of the Statute.

AN Order of Juſtices, where it was ſaid that he *may* become chargeable, quaſhed.

The

The King verſus *Inhabitants of Corſham and Weſtbury.*

PER Holt C. J. Where Juſtices remove a Woman big with Child from *A.* to *B.* and ſhe is brought to Bed in *B.* before the Order can be quaſh'd, and afterwards it is quaſh'd, *A.* ſhall maintain the Child; becauſe *A.* ſhall not take Advantage of their own Wrong, becauſe the Order was illegal.

An illegal Order of Removal ſhall not prejudice.

The King verſus *Inhabitants of St. George, Hill.* 4 *Annæ.*

AN Order of Seſſions was made to remove a Child, which was inſiſted to be a Baſtard, tho' born in lawful Matrimony, becauſe the Man and Wife were divorced by the Spiritual Court *a Menſâ & Thoro.*

A Child born where there is a Separation *a Thoro & Menſâ*, when to be held a Baſtard.

Per totam Curiam, It is a Baſtard; for, being divorced they would not intend that the Man and Wife came together unleſs it had appeared to be ſo; and it was held a good Order, tho' not ſaid they did not come together.

St. Giles and *Weybridge.*

AN Apprentice ſerved his Time with one who came into the Pariſh by Certificate, this is a good Settlement, as where a Lodger hires a Servant for a Year and he ſerves a Year, this is a good Settlement.

Apprentice of Certificate Man gains a Settlement. Rep. Q. A 204.

The King verſus *Newington Butts.*

THIS was on the Statute 2 *W. & M.* for cleanſing and paving the Streets in the Pariſhes of *London* and *Middleſex*; an Order was made by the Seſſions to rate all the Inhabitants, as well ſuch as lived on Pavements as thoſe who did

Streets and Highways in *London* and *Middleſex*. 1 Salk. 356. 5 Mod. 68. Skin. 643.

did not, to cleanſing the Streets and carrying away the Filth; and the Order was confirmed, becauſe the Words of the Act are expreſs on all the Inhabitants; and tho' it may ſeem not ſo reaſonable, yet the Judges will not expound it otherwiſe. Thoſe who have Pavements are bound to repair before their own Doors, and yet they muſt contribute to the Repairs of the Highways.

Carter and *Whittle.*

Orders of Juſtices.

PER Cur'. Where it appears that the Juſtices have no Juriſdiction on the Act for poor Priſoners, there we can relieve, for it is only ſuch poor Priſoners as are there particularly deſcribed; if it do not appear, we will ſuppoſe the Juſtices have done their Duty, unleſs the contrary appears; a Duplicate is Evidence *prima facie.*

The Inhabitants of Overton and *Steventon, Hill.* 10 *W.* III.

Single Woman, in Order, ſufficient.

What Hiring and Service good to gain a Settlement.

ONE in the Order ſaid to be a ſingle Woman (but not ſaid in the Words of the Statute *unmarried Perſon* not having) hired for Half a Year and ſerved it out, and then contracted with the ſame Perſon for a Year, and ſerved for Half a Year, and then went away by Conſent.

Per Rokeby, Turton and *Gould*, This anſwers the End of the Act, ſuch Service as this is, and this was held to be a good Service for a Year, and a good Order, tho' ſaid ſingle Woman, for that infers ſhe had no Children nor ever was married.

The

The Inhabitants of Joyford and *Solebury*, *Paſch.* 4 *Geo.* I.

Settlement gained by Service to two ſucceſſive Maſters, upon one Hiring.

AN unmarried Perſon was hired by one *Knight*, from *Michaelmas* for a Year, and he ſerved with that Maſter Half a Year till *Lady-day*, as Servant and Shepherd; at *Lady-day* the Maſter turn'd over his Buſineſs and Farm to one *Smith*, and the Servant too; and paid him Half a Year's Wages, but there was no new Contract between the Servant and *Smith*, but at the End of Half a Year *Smith* paid him 5 *s.* advance Wages for working in Husbandry, and he ſerv'd the other Half Year with *Smith*; this was held good Service, becauſe the Contract was not altered, it is a Service in purſuance of the ſame Hiring.

The Queen and *London*, *Trin.* 3 *Annæ.*

Of what Wages Juſtices of Peace have Cognizance. 6 Mod. 204. 1 Salk. 442. *Sett. and Rem.* 231.

WHERE it does not appear to the Contrary in an Order but that the Wages were for Husbandry, there it ſhall be ſo intended, and it is a good Order; but in this Caſe it appear'd not to be in Husbandry; for, this was an Order for Wages, for Labouring in the Gardens of *Hampton Court* for 16 *d. per* Day.

Per Cur': The Order is naught, he muſt bring his Action.

Holt quoted Lord *Oſſulſton*'s Caſe, which was an Order for his Coachman's Wages, which was quaſh'd; and ſaid that for a Journeyman Taylor they could not order his Wages; and tho' the Juſtices ſhould have exerciſed this Juriſdiction all along, yet that will not make it lawful. 6 *Mod.* 205. Mr. *London* was Overſeer of the Works at *Hampton Court* and employed theſe Labourers.

Atkins's Caſe, Hill. 5 *Geo.* I.

Orders of Juſtices, where they have Juriſdiction, not eaſily ſet aſide.

AN Order was made as to Wages in Husbandry, reciting that he had ſerved his Maſter for ſeveral Years paſt, amounting to 20*l.* and ordered it to be paid. *Objection*, It did not appear the Maſter was preſent; nor was it ſaid for how many Years he ſerved, nor what Wages were agreed for *per Annum.*

Yet *per Cur'*, It was held well, and they would intend the Juſtices had done Right, it appearing it was in Husbandry, and that they had a Juriſdiction.

The King and *The Inhabitants of St. Peter's in Oxon and Wiccomb, Mich.* 9 *Geo.* I.

Settlement gained by Service where Servant lies, whether Maſter has a Settlement, or not.

ONE *Stonel* a Stage Coachman liv'd at St. *Peter*'s, *Oxford*, and had Occaſion to take freſh Horſes at *Wiccomb*, and he hired one *Diſnel*, the Perſon in Queſtion, for a Year to look after theſe Horſes at *Wiccomb*, but *Stonel* lived at St. *Peter*'s all the while, and the Servant lived at *Wiccomb* for a Year.

The Court held him ſettled at *Wiccomb*, becauſe of his Service and Inhabitancy; his Maſter's Reſidency is nothing; nor whether he was ſettled or no, he could not be ſent to St. *Peter*'s, becauſe it did not appear on the Special State of the Order, that he was there for the Space of forty Days.

The Inhabitants of Lambeth, Trin. 8 *Geo.* I.

Farmers of Tithes under Compoſition rateable to the Poor.

Sett. and Rem. 104.

Haircloth and *Pether*, two who were Inhabitants of the Pariſh of *Lambeth*, and Farmers, and Leſſees of the Tithes of the Pariſh, were aſſeſſed 15*s.* for all the Tithes as Farmers and Occupiers, to the Rates of the Poor; but they appealed to Seſſions, as over-rated, becauſe they took no Tithes

in

in Kind but of one Farm of the Value of 10 *l. per Annum*, but the Landholders as to the other Farms in the Pariſh paid heretofore 2 *s.* 6 *d. per* Acre, and of late 3 *s. per* Acre, in Lieu of Tithes, 2 *s.* 6 *d.* to the Rector of the Pariſh, and the 3 *s.* to the Farmers, as Leſſees to the Rector during their Time; and the Court of Seſſions determin'd they were over-rated, and reduced the above Sum to 7 *s.* 6. *d.* which were a Rate only for the Tithes of the above Farm of 10 *l. per Annum.*

But the Court quaſh'd the Order of Seſſions, and held the Rate good, and that they were rateable as well for what was under thoſe Compoſitions, as what was uſed to be given in Kind; and held the Landholder who paid the Compoſition Money (which was one Species of Tithes, as if it had been a *Modus*, which is a Tithe) ought to pay; for he that farms the Tithes is the true Occupier both of Tithes in Kind and other Tithes, and he has the Benefit, and may take it in Kind when he pleaſes; for if the Parſon did not farm his Tithes, he muſt pay for the whole, and if he leaſes, the Occupier or Leſſee muſt. The Parſon is liable by the Word *Tenement*, for his Tithes, and is liable to repair the Highways, *per Hale*, and to ſend in Carts; and the Clergy are bound to all new Charges, as others, if not exempt, tho' heretofore the Lands of the Church were not liable. Tenement.

Nokes and *Watts.*

Pauper.

PER Cur': We cannot give Coſts for not going on to Trial againſt a *Pauper* where he is Leſſor of the Plaintiff, becauſe it is againſt the expreſs Words of the Act of Parliament, and it is to impriſon him for Life, ſo the Motion was denied; if he be Vexatious, you may move to diſpauper him.

if Vexatious to be diſpaupered.

Sloman

Sloman and *Aynel*, 11 *Geo.* I.

Pauper ſhall pay no Coſts tho' diſpaupered.

AYNEL brought Action againſt *Sloman*, and being admitted *in Forma pauperis*, he was nonſuited, and Judgment enter'd up againſt him for Coſts of the Nonſuit; and he was taken in Execution; but on Motion of Mr. *Forteſcue* he was diſcharged *per Cur'*, tho' it was urged he was diſpauper'd; for, being once admitted, he ought to pay no Coſts. 1 *Roll's Rep.* 81.

The King verſus *Inhabitants of St. George's*, *Trin.* 9 *Geo.* I.

Overſeers of the Poor, how to be nominated.

THE Nomination of Overſeers of the Poor, was, that ſuch and ſuch by Name were appointed to ſet the Poor on Work, *&c.* and mentioned the ſeveral Duties in the Act, but did not in expreſs Words appoint them Overſeers; and for that Reaſon this Nomination was quaſh'd.

The Inhabitants of Everſley, Blackwater and *St. Giles's.*

Child is ſettled where the Father is ſettled.

Sett. and Rem. 15. 2 Ld Raym. 1732.

PER totam Curiam, Held the Father's Settlement a good Settlement of a Legitimate Child in a Pariſh where the Child never liv'd, the Father was ſettled in the Pariſh of *A.* and the Child was born in the Pariſh of *B.* it is not ſettled where born, but where the Father was ſettled.

The King and *The Inhabitants of St. John Baptiſt, Trin.* 10 *Geo.* I.

AN Apprentice for five Years eat and drank and work'd with his Maſter, but the Juſtices in their Order ſpecially found that he did not lodge one Night with his Maſter in the Pariſh of St. *John Baptiſt*; ſo *per Cur'*, held he was ſettled where he lodged.

Servant gains Settlement where he lodges.

The King verſus *Inhabitants of Puckington and Sibington, Paſch.* 10 *Geo.* I.

AN Apprentice lives with his Maſter ſix Months at *P.* and his Maſter failing, the Apprentice, without his Maſter's Privity, on his own Head, hires himſelf for a Year as a Covenant Servant in the Pariſh of *S.* and ſerves with the ſecond Maſter the Time out.

An Apprentice cannot hire himſelf without his Maſter's Conſent.

The Court held his laſt legal Settlement was at *P.* as an Apprentice, and the Contract with the ſecond Maſter was a void Contract, for he was not *ſui juris* to make it without his Maſter's Conſent; and the Order of Seſſions quaſh'd.

The King verſus *Inhabitants of Rufford, Hill.* 8 *Geo.* I.

ON a Return to a *Mandamus* to Juſtices of Peace to appoint Overſeers, that it was an extraparochial Place, on ſolemn Argument and Debate, it was adjudged that Juſtices have a Power, and ought to appoint Overſeers in an extraparochial Place; and relied on the Caſe of Inhabitants of *Dolten* and *Stokelane*.

Juſtices of Peace may appoint Overſeers of the Poor in extraparochial Place.

1 Mod. Caſes 39.

The King and *Inhabitants of Cumner and Milton, Trin. 2 Annæ.*

The Settlement of the Father is a Settlement for the Child. Salk. 528. 6 Mod. 87. Sett. and Rem. 239, 242.

W. P. an Infant, was born at *Cumner* where his Father had a legal Settlement; but after that his Father was ſettled at *Milton*, by renting 38 *l. per Annum*, and living there ſix Years; and then the Father was thrown into Gaol, and the Son was removed by two Juſtices to *Cumner*, the Place of his Birth, and the Juſtices at Seſſions confirm'd this Order, which was now mov'd to be quaſh'd, and it was quaſh'd accordingly. Urged by Counſel, that Birth makes no Settlement, except in caſe of Baſtardy; and tho' *Holt* C. J. ſaid on the firſt Argument, that Birth is the primary Settlement, yet on the laſt Argument, he thought it made none, where the Father is ſettled; and ſaid the Son ought to be ſettled where his Father had gain'd a Settlement, and that the Child ſhould follow the Father; and *Powell* ſaid it would be very unnatural to ſend Children from their Parents.

The Inhabitants of Pepper Harrow and *Frencham.*

Hiring to gain a Settlement ought to be for an whole Year. Sett. and Rem. 56.

ONE was hired the third of *October*, and from that Time to *Michaelmas* next, and ſerved out the whole Year and was paid accordingly; at firſt the Court ſeem'd to think it Fraud apparent, but after held it to be no good Hiring, for by *Parker* C. J. where ſhall we ſtop, if not where the Act ſays? He may be hired ſo, and we are not to preſume Fraud, the Juſtices might have found it ſo; and he quoted the Caſe of one hired ten Days after *Michaelmas* to *Michaelmas*, and held not well.

In orders of Juſtices preciſe Certainty not neceſſary.

Horſman objected to an Order, that in the Complaint it was ſaid Chargeable to —— Pariſh, but Juſtices in their Adjudication ſay, is likely to become Chargeable, but not ſaid to what Pariſh, yet held well, becauſe it appears they have Juriſdiction, *Hill.* 5 *Geo.* I. *Trin.* 10 *Geo.* I. ſame Caſe

adjudged; *per Cur'*, the Pariſh was in the Complaint, and in the *Adjudicat'* generally, that he is likely to become Chargeable, and not ſaid to what Pariſh.

The Inhabitants of Stallemberg and *Haney, Lincoln, Hill.* 5 *Geo.* I.

ORDER of two Juſtices to remove to *A.* unleſs they ſhew Cauſe; *per Cur'*, this is not final, but Conditional; alſo objected the Juſtices ſay we do believe. Orders of Juſtices, how to be drawn.

Per Cur': Held ill.

The King verſus *Inhabitants of Panington.*

ON 12 Queen *Anne*, for removing of Vagabonds, a Perſon found wandring, tho' no Vagabond, may be ſent to the Place of his laſt Settlement, but it muſt be by two Juſtices; and this being by one Juſtice only, was for that Reaſon quaſh'd. Perſons wandering.

The Inhabitants of King's Langley, Trin. 11 *Geo.* I.

A Child of two Years old was ſent to the Place of its Birth as a Vagabond by the Statute, but they did not ſay in the Order, they could not find the Father's Settlement, and the Father was preſent before the Juſtices; the Child being under Fourteen, it was quaſh'd *per Cur'*, for, this gives them Juriſdiction. *Vide* Statute 12 *Anne*, *p.* 409. A Child under fourteen Years, to be ſent after Father or Mother. Sett. and Rem. 120, 147.

A Vagabond is firſt to be ſent to the laſt legal Settlement; if that is not to be found, then to the Place of his Birth, or if under Fourteen, to the Place of Abode of Father or Mother, if Place of Birth, or Parents may be known; but if the ſame cannot be known, then to the Pariſh or Town where he

he was laſt found begging, a miſordering himſelf, and paſſed unapprehended, there to be provided for.

Stat. Raſtal 23 *Ed.* 3. *cap.* 7. None, upon Pain of Impriſonment, ſhall under Colour of Pity or Alms, give any Thing to ſuch which may labour, that thereby they may be compell'd to labour for their Living: Recites, are many valiant Beggars, refuſe to labour, *&c. Vide* Stat. printed by *Pynſon*, this Act is in *Latin*, and valiant Beggars are called *Validi Mendicantes*, *&c.*

The King and *Inhabitants of St. Leonard's Shoreditch, Trin.* 11 *Geo.* I.

Where a Pariſh has different Liberties, who may make Rates.

THIS Pariſh has three Liberties, one Liberty made a Scavengers Rate of 9*d.* in the Pound, excluſive of the Reſt, and on Appeal to Seſſions, that Rate was quaſh'd; this Order of Seſſions was affirmed *per Cur'*, becauſe it appeared that there were not Officers in this Liberty which are required by the ſecond of *W. & M.* to make a Scavengers Rate, and here were no Church-wardens.

The King and *Inhabitants of St. John's, Clerkenwell, Trin.* 11 *Geo.* I.

Diviſion of Pariſhes *ſur Stat.* 10 *Annæ.*

THIS was upon *Stat.* 10 *Annæ*, An Act for Building new Churches, and dividing Pariſhes; this was a New Pariſh taken out of the Pariſh of St. *James's*, *Clerkenwell*, and tho' Officers, as Scavengers and other Officers, were appointed for the New Pariſh; yet the Officers of the whole Pariſh made a Rate to reimburſe the Scavengers of the Old and whole Pariſh, for the New Pariſh as well as Old one to pay; this Order was appealed from to the Seſſions, and affirmed; and on *Certiorari* into *K. B.* was held a good Order, and that no Rate for Scavengers could be made by the New Pariſh, until there was an effectual and perpetual Diviſion made as by the Act directed, as to the other great Rates, as for Relief of Poor, Church Rates, and for Highways, which *per* Order appeared was not done.

The

The King and *Venables, Trin.* 11 *Geo.* I.

PER Cur': On great Argument and Debate, and on Objection made, that on an Order for ſuppreſſing an Alehouſe, there ought to be a Summons; held no need of ſetting out the Summons in the Order, (tho' Summons neceſſary by natural Juſtice,) notwithſtanding the Caſes of *The King* and *Dyer*, and *The King* and *Green*.

No need to ſet out Summons in an Order, &c. 2 Ld Raym. 1405.

The King and *Auſtin, Mich.* 11 *Geo.* I.

ORDER for ſuppreſſing Alehouſe becauſe a Bawdy-houſe.

County in Margin of Order, not ſufficient. 2 Ld Raym. 1406.

1ſt *Objection*, Not ſaid a common Alehouſe; over-ruled.

2d *Objection*, Not ſaid in Order, Party was ſummoned.

Court differed; but this was ſettled in *The King* and *Venables*, *ante*, not ſaid Alehouſe was in the County, but County in Margin.

Per totam Curiam, On Conſultation and Precedents, quaſh the Order for this Cauſe.

Borough of Taunton, Paſch. 12 *Geo.* I.

RATE for Poor, and Appeal to Seſſions of Borough, and held well; for there is a Clauſe in 43 *Eliz.* that ſays, Juſtices and Seſſions of Borough ſhall have Power excluſive of County.

Appeal on Poor Rate may be to Borough-Seſſions.

The Inhabitants of Warminſter and *Leiceſter, Mich.* 8 *Geo.* I.

Notice of coming into a Pariſh where not neceſſary.

ONE in King *James* the Second's Time was hired a Servant for a Year, but ſerved Three Quarters of a Year only; he was remov'd by two Juſtices, ſuppoſing he ſhould give Notice, it being before 3 & 4 *W.* & *M.* that orders Service for a Year.

Per Cur': 'Tis a good Settlement, tho' he did not ſerve out the Year, and he need not give Notice; for a Servant and Apprentice need not give Notice, becauſe to no Purpoſe; for, if they did give Notice, you could not remove them from their Maſters.

The Inhabitants of Borough-Fenn, Trin. 12 *Geo.* I.

Order to rate one Pariſh in Aid of another, how to be made.

ORDER to Tax this Place in Aid of another Pariſh.

1ſt *Objection*, They do not ſhew that *Borough-Fenn* is out of the Pariſh.

2d *Objection*, They have made a Rate and taxed only ſome particular Perſons, againſt *Clerk's* Caſe, 5 *Co.*

Per Cur': The Order is naught, particularly for the firſt *Objection*, becauſe it is the Foundation of their Authority, that it lies in another Pariſh; but Ch. J. doubted as to the Second, becauſe of the Words *any other of other Pariſhes*, tho' he thought it reaſonable the Rate ſhould be equal; but I thought *econ'* from the Words of the Clauſe, which are Words of Reference; that Juſtices may tax as aforeſaid, *i. e.* to tax every Inhabitant and Occupier of Land, as it is in the former Part of the Act, they could not mean to lay it on one or two.

The

The King and *Inhabitants of St. George, Mich.* 12 *Geo.* I.

AN Order was made by Juſtices at Seſſions to make a Rate on other Pariſhes, becauſe that Pariſh not ſufficient, and tho' it did not appear whether the Order was made before the ſix Days Work done, or after, yet well; and held it was founded on *Stat.* 3 & 4 *W.* & *M.* and not on 1 *Geo.* I. which ties up the Appeal to next Seſſions; ſo held that of *Geo.* I. only explanatory of 3 & 4 *W.* & *M.* and tho' they did not appeal at next Seſſions, yet held they might at another Seſſions; and as to the Matter of accompting, that is within 3 & 4 *W.* & *M.* only; ſo they may appeal clearly as to that, after next Seſſions.

Orders for Highways, how to be,

And when the Appeal.

The Inhabitants of Capel and *Weſt-Pecham.*

ORDER to ſend a poor Perſon from *Capel* to *Weſt-Pecham*, and on Appeal to Seſſions this Order is quaſh'd on the Merits; and four Years after two Juſtices ſend the ſame Perſon from the ſame Place to the ſame Place; and it was inſiſted the Court would intend a new Settlement in four Years.

An Order of Juſtices appearing to be contrary to a former, is void.

Sett. and Rem. 207. Far. 54.

Per Cur'. The Order muſt be quaſh'd, for here is a Judgment that *Pecham* was not the Place of Settlement; and as long as that is in Force, the Juſtices had no Authority to ſend to the ſame Place unleſs a new Settlement, or a good Reaſon had appeared in the Order as a Foundation for their Authority; for the Court can intend nothing.

The

The King and *Inhabitants of Woodend, Northampt', Hill.* 13 *Geo.* I.

A Mother may gain Settlement for Child, ſubſequent to the Father's.

AN Order to ſettle a Child at the Pariſh where the Father was ſettled, when the Child had after a Settlement by the Settlement of the Mother, ſubſequent to that of the Father; ſo the Order was quaſh'd, becauſe it ſhould be ſent to the Settlement of the Mother being ſubſequent; as it was adjudged in the Caſe of the Inhabitants of St. *George, Southwark* and St. *Katherine*'s.

The King and *Inhabitants of Portſmouth, Hill.* 13 *Geo.* I.

Where Service muſt appear in Order of Settlement. *Sett.* and Rem. 123.

A Perſon was retained as a Weekly Servant to a Captain, in the Year 1690, before the Act for retaining for a Year, and ſerving for a Year; they quartered in *Wincheſter*, and the Servant continued with the ſaid Captain for two Months, and lodged in the ſame Inn; but the Order did not ſay he continued in the ſame Service, or as his Servant, for he muſt continue as his Servant for 40 Days; agreed no need of Notice in Caſe of a Servant; the Order was quaſh'd.

Dean of Dublin verſus *Archbiſhop of Dublin, Paſch.* 10 *Geo.* I.

THE Archbiſhop attempted to Viſit the Dean, as Dean and Chapter of *Trinity, Dublin*; the Dean refuſed, and for his Contempt was ſued in the Spiritual Court, and a Prohibition was granted, and he declared in that, ſuggeſting that the Court had no Juriſdiction, and ſetting out that the Dean and Chapter was from a Tranſlation of Prior and Convent, and were made ſo by Letters Patent of *H.* 8. and ſuggeſted that where the Deanery is of Royal Foundation the Archbiſhop has no Power; the Biſhop pleads, and traverſes that the Prior and Convent is of Royal Foundation; the Dean demurs; and Exception was taken that this Traverſe is immaterial.

Royal Foundations, not viſitable by Biſhop. 1 Mod. Ca. 27.

Per totam Curiam, Judgment for the Defendant, the Archbiſhop, that it is the moſt material Thing whether it be of Royal Foundation, for then the Biſhop has no Right; and this Judgment was affirmed in the Houſe of Lords.

But an *Objection* was, He ought to traverſe that Dean and Chapter was of Royal Foundation.

Anſwer, Tranſlation makes no Alteration, if the Dean was Viſitable; in this Caſe was quoted *Harriſon* and *Archbiſhop of Dublin.*

Anonymus, Mich. 7 *Geo.* I.

IN the Replication, the Plaintiff's Name being *Walter*, and the Defendant's *Aaron*; the Plaintiff begins *Et præd' Walterus dic'*, that he ought not to be precluded of his Action, *pro placito præd' Will'us dic'* for [*Walterus*] *quod ipſe præd' Will'us*, inſtead of [*Walterus*] did not receive the ſaid Hogſhead of Wine in Satisfaction.

Conſtruction to ſubſtantiate Pleading.

Per Cur': Held a good Replication; *pro placito dic'*, will relate to *Walterus* in the Beginning of the Replication, and the ſecond *Will'us* is unneceſſary, the Relative *ipſe* refers to *Walterus* too.

Mulſo verſus *Shere, Trin.* 4 *Geo.* I.

Scire facias in Replevin, how to be brought.

Scire facias brought by *Mulſo* verſus *Shere*, Plaintiff in Replevin, and three others, who were Pledges in the ſame Replevin brought by *Shere*, on a Diſtreſs for Rent made by *Mulſo*; it was objected, *Firſt*, the *Scire facias* would not lie on a Plaint in Replevin, as here, the County-Court not being a Court of Record, but it would lie on a Writ, becauſe it is a Record. 2. That *Shere*, who is the Principal, cannot be a Pledge for himſelf. 3. Ought not to ſue Pledges till Principal guilty; tho' here was *Elongat'* return'd. 4. That Writ of Inquiry is *tot & talia* of Goods, and don't ſay what particularly. 5. There was a Diſcontinuance in a former Suit.

Per Cur': Judgment for the Plaintiff, there is no Diſtinction between a *Scire facias* or Writ or Plaint, one may be Bail with others for himſelf; the Principal appears to be guilty by *Elongation*; the Writ of Inquiry is reducible to a Certainty, and Diſcontinuance is nothing in this Suit, unleſs it had been void or a Nullity; and the Caſe of *Dorrington* and *Edwin*, 3 *Mod.* 56. is in Point.

Mansfield verſus *Richman, Paſch.* 2 *Geo.* II.

When Pledges may be entered?

Indebitatus Aſſumpſit, and Demurrer to the Declaration, and for Cauſe, ſhews that no Pledges are on the Writ, or mentioned in the Declaration.

Per totam Curiam, Judgment *pro quer'*, for he may enter Pledges at any Time before Judgment, becauſe Pledges are not liable before Judgment, and not then if it be for the Plain-

tiff; and *Bains* Serjeant ſaid it had been ſo determined before in this Court. 1 *Cro.* 91, 92. *Hutton* 92. *Hob.* 93.

Hayn verſus *Bigg.*

The Sheriff's Duty in taking Pledges in Replevin.

Scire facias againſt the Defendant, as late Sheriff, on the Statute of *Weſtminſter* the 2d, for want of taking Pledges on a Replevin. The *Scire facias* ſets out that one *William Poynts* brought Replevin againſt the Plaintiff, and that the Defendant replevied the Goods, and deliver'd them to the Plaintiff in Replevin, on which there was a *Recordare* to remove the Plaint into this Court, and thereupon the Defendant, as Bailiff, avow'd for Damage-feſant, on which there is Judgment *per* Default againſt Plaintiff and his Pledges, to have a Return of the Cattle and Damages, on which iſſues a *Ret' Habend'*, on which the Sheriff had replevy'd, and delivered the Goods without taking any Pledges either to proſecute or to return the Goods, againſt the Duty of his Office and the Statute; then a *Scire facias* iſſues againſt the Sheriff why he ſhould not *tot bona & catalla, &c.* or the Price thereof render to Plaintiff, and demands *tot vel tanta*, or the Price thereof, for not taking Pledges; and the Sheriff pleads that he took Goods, but does not ſay the ſame Goods as in the Declaration, and took ſufficient Pledges, *viz.* the Plaintiff and *J. S.* who entered into Bond, with Condition to proſecute with Effect, and make a Return of the Goods, but does not ſay the ſame Goods as in the Declaration, to which Plea there is a Demurrer.

How he is to plead?

And *per Cur'*, Judgment *pro quer'*, becauſe the Defendant has not pleaded *ad idem*; for, it appears the Goods are different, and not the ſame as in the Declaration, and they held that Replevin Bonds were good and legal both to proſecute and to make Return, and have been held ſo, and held that one Pledge with the Plaintiff was well.

Bagot

Bagot and *Oughton, Paſch.* 10 *and Mich.* 12 *Geo.* I.

In Execution of Powers all Circumſtances to be obſerved. 1 Mod. Ca. 249, 381.

A Settlement was made on levying a Fine by Dame *Frances Bagot* and Sir *Edward*, of her Lands, to the Uſe of Sir *Edward* for Life, then to the Uſe of her for Life, *ſans* Impeachment, provided that the ſaid Sir *Edward* and Dame *Frances* during their joint Lives, and the Survivor of them during his or her Life, at all Times hereafter may make any Leaſe or Leaſes ſigned by them during their joint Lives, and ſigned by the Survivor of them during his or her Life, in Poſſeſſion, of all or any of the Premiſſes in the ſaid Indenture, *&c.* for any Term or Number of Years, not exceeding 21 Years, at ſuch yearly Rents, or more, as the ſame are now let at. The Lady afterwards marries with the Defendant Sir *Adolphus Oughton*, and then both join in a Leaſe, and demiſe to one *Grove* the Capital Manſion-houſe, which was the Seat of her Father, Sir *Thomas Wagſtaff*, and the Demeſn Lands, which were never leaſed before, for 21 Years, reſerving 42 *l.* Rent, in Truſt for the Defendant.

This Caſe was referred by the Lord Chancellor to the Court of *K. B.* and the ſame was argued twice before *Pratt* Ch. J. firſt, and then before *Raymond* Ch. J. (at the former Argument puiſne Judge) at Juſtice *Powis*'s Chamber, he having the Gout; and they were all Unanimous, that this was a void Leaſe, notwithſtanding the Caſe of *Cumberford* on the other Side, and the Caſe of *Walker* and *Wakeman*, 2 *Lev.* 150. and they relied on the Caſe of *Vaughan* 28. as in Point; and that here was no *ita quod*, as in that Caſe of *Cumberford* and *Wakeman*, and gave their Opinions in Writing accordingly. The Court doubted if this were a good Leaſe by the Statute, and whether on the ſecond Marriage ſhe could make ſuch Leaſe.

In Revocations and Executions all Circumſtances, as Sealing, Delivery, Witneſſes, *&c.* muſt be obſerved, elſe it is no Revocation. And in Equity it is the ſame, unleſs in the

Caſe of Purchaſers, Creditors, and younger Children, or unleſs where the Intention is clear, and the Party goes as far as he can, and is not able to comply, or is prevented by Fraud and ſecreting the Deed of the Power by him who is to have the Advantage of it. *Scroop's* Caſe, 10 *Co.* 144. *Hob.* 312. *Kilet* and *Lee*, and *Earl of Bath* and *Mountague.*

Weſtlen verſus *Eales*, *Mich.* 9 *Geo.* II.

ON ſpecial Action of the Caſe for a Nuſance, Plea that Defendant did remove the Nuſance; agreed Plea naught, being only Matter of Fact, not Law.

Plea, Defendant removed Nuſance, ill.

White and *Clever*, *Mich.* 13 *Geo.* I.

DEBT on Bond, with Condition carefully to execute the Office of Overſeer of Poor, ſingly without the Aſſiſtance of the Plaintiff; the Defendant pleads that he did execute the Office ſingly without the Aſſiſtance of the Plaintiff; and Plaintiff replies he did not execute the Office ſingly without the Aſſiſtance of the Plaintiff; the Defendant rejoins that the Plaintiff voluntarily took on him the Office without the Defendant's Requeſt, and that he did it without his Requeſt.

Departure. Ld Raym. 1449.

Per totam Curiam, This is a Departure from the Defendant's Plea, and a Contradiction; and Judgment *pro quer'*.

Hyder verſus *Warren*, *Trin.* 3 & 4 *Geo.* II.

DEBT on Recognizance of Bail; the Defendant pleads no *Ca' Sa'* againſt the Principal; Plaintiff ſets out one, and the Defendant replies *erronice emanavit*; this is a Departure.

Departure.

Per Cur': Judgment *pro quer'*.

Gery verſus *Bayley, Mich.* 7 *Geo.* I.

Plea of Bankruptcy to conclude to the Country.

PLEA of Bankruptcy *per* 5 *Geo.* I. to Action brought againſt the Bankrupt which accrued before his Bankruptcy, ought to conclude to the Country; becauſe the Act ſays that if the Bankrupt be ſued he may plead in general, that the Cauſe of Action accrued before he was a Bankrupt, and give Special Matter in Evidence; ſo is the Caſe of *Miles* and *Williams*, and a late Caſe in *C. B. Fuller* and *Byng*, *Trin.* 3 *Geo.* 2.

Baxter verſus *Douglas, Hill.* 8 *Geo.* I.

Plea of Writ, how to conclude.

A Writ pleaded, and the Concluſion was, *Et hoc parat' eſt verificare.*

Per Cur': This is a good Concluſion becauſe it is Matter of Fact.

Croſs verſus *Bevan, Mich.* 13 *Geo.* I.

Plea of Infancy, how to conclude.

INdebitatus Aſſumpſit; the Defendant pleads *infra ætatem*, and concludes to the Country; and it was ſhewed for Cauſe on Demurrer that he ought to aver his Plea.

Per Cur': Judgment *pro quer'*.

Pickering verſus *Simonds, Paſch.* 5 *Geo.* II.

Plea that the Writ teſted before Action accrued, how to conclude.

PLEA to a Bond, that the Original was taken out before the Day of Payment in the Condition, without any Introduction, but did conclude *pet' Judic' quod breve caſſetur*; held well.

Talbot verſus *Hopwood, Paſch.* 5 *Geo.* II. *C. B.*

THE Replication in the Beginning pray'd Judgment and Damages, which was not right, but concluded right without praying Damages. The Concluſion makes the Plea.

Per Cur': Held well; for it is the Concluſion makes the Plea.

Hern and *Scawel, Trin.* 10 *Annæ.*

MOVED to reply double; ſeveral Judgments were pleaded *per* Executor, and would reply *Nul tiel Record*, and the Conſideration, *i. e.* that they were kept a foot by Fraud. Double Plea.

Per Cur': They are inconſiſtent, and you cannot plead them, as you cannot plead *Non eſt factum, & ſolvit ad diem*, nor can you plead a Releaſe, and Not guilty; nor in Indictment can you plead Pardon, and Not guilty; but beſides a Replication is not within the Act of Parliament; and it was denied. Replication, not within the Act.

Fiſher's Caſe.

MOVED to plead *Not guilty* and a Juſtification for a Way, to an Action of Treſpaſs, but denied *per Cur'*; for tho' it be no univerſal Rule that where one Plea admits the other, they ſhall not be pleaded; yet where it is an Old Bond, *Non eſt factum, & ſolvit ad diem* may be allowed, but here if you allow it in one Caſe you muſt in all. Double Plea in Treſpaſs.

Antony

Antony and *Williams, Trin.* 4 *Geo.* I.

Double Plea in Treſpaſs.

IN Treſpaſs, Pleas of Amends tendered, and a ſpecial Juſtification that Plaintiff's Fences were out of Repair, by Reaſon, *&c.*

Per Cur': Rejected, like *Not guilty*, and Juſtification for a Way.

Lord Bernard verſus - - - - -, *Hill.* 8 *Geo.* I.

Double Plea.

MOVED to plead double, *Non Aſſumpſit*, and Statute of Uſury, refuſed.

Hall and *Tullie, Paſch.* 8 *Geo.* I.

Pleading double, when to be granted.

MOVED to plead a ſecond Plea after pleading a firſt, refuſed *per Cur'*, for if you plead double, you muſt plead it at one and the ſame Time.

Haggard and *Collington, Trin.* 2 *Geo.* II.

Double Plea.

NON *Aſſumpſit* and *Ne unques Exec'* allowed *ſans* Affidavit.

Newman and *Chander.*

Double Plea.

BAnkruptcy and *Non Aſſumpſit*, the Plea is contradictory, and refuſed.

Biſhop of Wincheſter and *Cook, Paſch.* 3 *Geo.* II.

IN *Quare Impedit*, allowed Pleas that he was ſeiſed in Fee of the Advowſon, and that he had the next Turn of Preſentation. Double Plea in *Quare Impedit.*

Whelpdale verſus *Atkinſon.*

NON Aſſumpſit, and *Non Aſſumpſit infra ſex Annos*, refuſed to be pleaded. Double Plea.

Per Cur', contra Opinionem Forteſcue.

Verney verſus *Fox, Trin.* 5 *Geo.* II.

PER Cur': May plead trebly, and here allowed on a *South Sea* Contract; 1ſt, Was not poſſeſſed in his own Right. 2d, Contract not regiſtred. 3d, No Tender. Treble Plea allowed.

Glover verſus *Heathcot.*

NON Aſſumpſit, and a Releaſe, the Court refuſed it; they may give it in Evidence, but ſeem'd to think them contradictory. Double Plea.

Levat verſus *Reſhere, Mich.* 4 *Geo.* II.

CUR' gave Leave to plead *Non Aſſumpſit* and a Recovery and Execution executed as to Part of the Debt. Double Plea.

Prior verſus *Lord Ilay, Mich.* 8 *Geo.* II.

Double Plea, Iſſue taken on one of them; how to proceed.

THIS was a double Plea, *Non Aſſumpſit*, and *Non Aſſumpſit infra 6 Annos*, and a Replication to the ſecond Plea replied an Original, and Defendant rejoins *Nul tiel Record*, which was for the Plaintiff, and there was Judgment; and before the Trial of the Iſſue of *Non Aſſumpſit* the Plaintiff takes out a Writ of Inquiry, and executes it, after which the Iſſue is tried of *Non Aſſumpſit*, in which the Plaintiff is nonſuited; ſo mov'd to ſet aſide the Writ of Inquiry, becauſe they ſhould have waited the Event of the Trial of *Non Aſſumpſit*.

And *per totam Curiam*, The Writ of Inquiry was diſcharged; for if there be twenty Iſſues, if one be for Defendant, the Plaintiff cannot recover, for they are all to the whole, and he ſhould have ſtaid till the other Iſſue was tried, and the Plaintiff had no Coſts.

Price verſus *Kenrick, Paſch.* 9 *Annæ.*

Releaſe after Action brought, when to be pleaded.

DEBT on Bond in *Michaelmas* Term, and Imparlance to *Hilary* Term next, and after that the Plaintiff releaſes the Defendant, upon which the Defendant pleads this Releaſe in Bar as an Original Plea, and not as a Plea *puis darrein continuance*.

Per totam Curiam, It is a good Plea; for, the Diſtinction is, if a Releaſe or other Bar happens before Iſſue, it may be pleaded, becauſe it is pending the Writ; but if after Iſſue joined it is to be pleaded *puis darrein continuance*. Vide 2 Lutw. 1177. 3 Cro. 49.

Obin verſus *Knott, Mich.* 9 *Geo.* II.

NUL tiel Record being in the Negative need not be aver'd. Averment.

Peters verſus *Morehead, Mich.* 4 *Geo.* II.

A. Deviſes to his Son for Life; after his Death, then the ſame and ſuch Parts thereof to the Uſe of ſuch Woman as ſhall be his Wife, for her natural Life, as and if he ſhall, by Deed or Writing under Hand and Seal in Preſence of three Witneſſes, direct, limit or appoint for that purpoſe, and then to the Uſe of the Heirs of his Body; the Son by Deed, in Preſence of three Witneſſes, grants and aſſigns to Truſtees, *Habend'* to them and their Executors, in Truſt, to permit himſelf for Life to receive the Profits, and after his Deceaſe for the Uſe of his Wife *Dinah* for her natural Life, and immediately after her Deceaſe for the Uſe of the Heirs of her Body lawfully begotten. Appointment of Eſtate.

Objection: Here is an Eſtate limited to the Wife in Tail, and the Power is for Life.

Anſwered and ſo reſolved, this is a good Appointment; tho' nothing paſſes by the Deed, which is void to raiſe any Uſe, but ſhall enure as an Appointment. And *per* Ch. J. The Eſtate is appointed by the Will, and the Son is only to name and appoint the Lands, and not the Eſtate which was appointed before. This was a Cauſe I tried, and ordered a Caſe to be made, and it was argued in *C. B.* twice.

Thompſon verſus *Roberts, Hill.* 5 *Geo.* II.

AN Action of Treſpaſs for taking and carrying away ſo many Cart-load of Stones; the Defendant juſtifies, and pleads that the *Locus in quo* is Part of the Waſte of the Manor Freeholders in a Manor to preſcribe, &c. not to lay a Cuſtom.

Manor of *L.* and that there are many Quarries of Stone there which are open; and that Time out of Mind there was an antient Cuſtom, *quod liberi tenentes aliquoru' antiquoru' Meſſuagiorum ſive terraru'* within the Manor by themſelves and Servants to dig and carry away Stones for repairing their Houſes, or building others.

Per totam Curiam, This is an ill Plea; for it ought to be pleaded by Preſcription, and by way of *Que Eſtate*, and not by way of Cuſtom, which is the way of pleading by Copyholders only; as is the Caſe of *Crowther* and *Oldfield*; Tenant for Life cannot preſcribe indeed, but here *tenentes terraru'* in Law ſignifies Tenants of Freehold and Inheritance.

Smith verſus *Morris*, *Trin.* 5 & 6 *Geo.* II.

Leſſee for Years cannot preſcribe.

A Preſcription was in Name of Leſſee for Years, to have Cattle water'd in ſuch a Cloſe; held naught; ought to be in the Lord who was Tenant in Fee.

Kemp verſus *Capon*, *Mich.* 4 *Geo.* II.

Preſcription to cut Trees.

MOTION in Arreſt of Judgment; Iſſue was joined and found, which was a Preſcription for cutting down all the Trees growing upon two Roods of Land of the Plaintiff, as belonging to the Defendant's Meſſuage, and held a good Preſcription *per totam Curiam*, *abſente Price*; For, firſt it may have a lawful Commencement, *i. e.* by Grant, and 2 *Cro.* 208. and *Yelv.* the ſame Caſe is in Point, where it was for cutting down *Spinas omnes & Arbores.*

Preſcription for all the Profits of Land for Part of the Time, and for Part of the Profits all the Year, is a good Preſcription.

Owen & al' verſus *Reynolds, Mich.* 5 & 6 *Geo.* II.

DEBT on Bond, conditioned to ſave harmleſs from Tonnage of Coals due to *William Biddle*; Defendant pleads *Non damnificat'*; Plaintiff replies, That *Biddle* diſtrain'd for ſaid Coals, and Defendant rejoins, that nothing was due to *Biddle* for Tonnage; this held to be a good Rejoinder and no Departure, for it fortifies the Plea, and gives a good Reaſon why he was not damnified.

Rejoinder which fortifies the Bar is not a Departure.

Lance and *Theedam, Trin.* 7 *Geo.* I.

PLEA, that he was a Clerk to one of the Prothonotaries; the Plea was ſet aſide, becauſe he did not ſwear he was in his Service actually; the Plea was right, that he did Buſineſs as a Clerk in the Office, but he did not ſwear it.

Plea of Privilege.

Onſlow verſus ——

PLEA, that he was a Clerk in the Prothonotaries Office and did Buſineſs there, and the Affidavit was, that it was a true Plea.

The like.

Per Cur': That is evaſive, and they ſet aſide the Plea.

Brown verſus *Sir W. Morgan, Bart. Mich.* 4 *Geo.* II.

THIS was an Action of the Caſe on a promiſſory Note, and ſaid in the Recital of the Writ, *quod ſummonitus* inſtead of *Attach'*, but held well; and ſo reſolved on Debate in Caſe of a Member of Parliament, in the Caſe of *Lockyer* and *Chetwynd*, in *C. B.*

Summonitus inſtead of *Attachiatus*, in Caſe of a Member of Parliament.

Holliday verſus *Pitt*, 23 *May* 1734.

Privilege of Parliament allowed without pleading it.

BEFORE all the Judges, by a Majority, Chief Baron *Reynolds* and Baron *Thompſon diſſentient*, Reſolved, That a Member of Parliament may be diſcharged, without pleading the Privilege, and Lord *Mordington*'s Caſe in Point, *ante*.

Read and *Chambers*, *Mich.* 9 *Annæ.*

Affidavit ought to be as full as Plea of Privilege.

A Plea, that he was Clerk of Prothonotary, and that he dayly attended, and did ingroſs and draw Pleas, and do other Buſineſs for him in his Office, and the Affidavit was only that he was a Clerk of the Office, and was ſo for ſeveral Years.

Per Cur': Let the Plea be ſet aſide, becauſe the Affidavit is inſufficient; he ought to ſwear as fully as the Plea is.

Wheely and *Richam*, *Mich.* 6 *W. & M.*

Privilege of Attorney, not pleadable againſt the King.

PER *Holt* Ch. J. Privilege of Attorney is not pleadable to an Action *qui tam pro Domino Rege*, *&c.* or at the Suit of the King, for the King may ſue where he pleaſes; if Privilege be not good againſt Privilege, as it is not, certainly no Privilege is good againſt the King.

Daſhwood and *Fowkes*, *Mich.* 4 *W. & M. C. B.*

Privilege in *C. B.* by Officer of *B. R.*

3 Lev. 343. Clift 287.

OFFICER of *B. R.* was arreſted *per Capias* out of *C. B.* the Defendant appeared and put in ſpecial Bail, and pleaded to the Juriſdiction of the Court, that he was an Officer of *B. R.* and ought to have his Privilege; and held a good Plea, and that it was no Waver of Privilege, and did amount to no more than a common Appearance.

Thick-

Thickbroom and *Boot*, *Paſch.* 3 *Geo.* II.

PRivilege was pleaded thus, *Quod ipſe & omnes al' Attorn' & quilibet eor' dum ſic aliqua negotia proſequitur ad reſpond' coram aliquibus Juſtic' trahi ſeu compelli non debent*; this is well, being *omnes & quilibet*; but if it had been *Quod omnes non debent compelli*, that would be a Negative pregnant; for all may have not anſwered at other Courts, and ſome may. 1 *Sid.* 164. *Lutw.* 639. 1 *Keb.* 256. Plea of Privilege by Attorney.

Bareton verſus *Stephenſon*, *un' &c. Paſch.* 5 *Geo.* II.

PLEA to a Bond Privilege of an Attorney of Common Pleas, that they ought not to be ſued in the County of *York*, where the Suit was here, but in County of *Middleſex*. *Venue* in Privilege may be in remote County.

Per Cur': Anſwer over, there is no ſuch Privilege, if it be brought in the Common Pleas 'tis enough.

Reeves verſus *Blyth*, *Trin.* 5 & 6 *Geo.* II. *C. B.*

SAME Plea to Action brought in *London*, and Judgment *Reſpondeat ouſter*. The like.

Faulk verſus *Berry*, *Trin.* 5 & 6 *Geo.* II.

PRivilege of an Attorney of Common Pleas pleaded, that there was a Cuſtom in Common Pleas, that no Attorney ſhould be compell'd againſt his Will to anſwer to any one in perſonal Actions, *proſecut' per Orig'*, which touch not the King; held good Plea, tho' he ſhews not a better Writ, for it is Matter of Law, and not Matter of Fact; he has ſet out Plea of Privilege by Attorney of *C. B.*

out what is in his Knowledge; and need not except criminal Matters, for thoſe concern the King, and it is ſaid in perſonal Actions.

Everett verſus *Blyth*, *Hill.* 6 *Geo.* II. *C. B.*

Privilege. SAME Caſe as *Barcton* verſus *Stephenſon* before, only this laid in *London.*

Pack and *Lapel*, 3 *Geo.* I.

On the Act concerning Army Accounts. THE Act 3 *Geo.* 1. ſays, Touching the Account of the Army, that no Proceſs ſhall go out but after the Account is ſtated and ballanced; *Reeves* moved to quaſh the Proceſs on Affidavit of the Fact, that no Ballance was made or Account ſtated, but the Court denied to quaſh the Proceſs, and bade them plead this Matter; and took a Diſtinction between where the Act ſays, That the Proceſs ſhall be void, which is the Caſe of ſuing an Ambaſſador, and where it is ſaid only no Proceſs ſhall iſſue; but Court gave Time to plead.

Rycraft verſus *Calcraft*, *upon Stat.* 12 *Geo.* I.

Plea of Juſtification by Proceſs in inferior Court. CASE againſt an Officer for an Arreſt and falſe Impriſonment; he pleads a Proceſs of an Inferior Court; Plaintiff replied the Debt was 5 *l.* and no Affidavit made of the Debt.

Per Cur': It is no good Replication, for the Caſe of an Affidavit in any Inferior Court is drop'd in the Act; but *per Cur'*, this is an Action againſt an Officer, and this is an Excuſe good enough for him. *Vide Turner* and *Felgate*; beſides the Proceſs is not made void by the Return.

Ede

Ede and *Jackſon.*

THERE are two Things in Prohibition, 1ſt Contempt of the Crown, and Diſheriſon of it in taking on them judicial Power where they have no Right; 2d is a Damage to the Party: And a Suit for this muſt be brought before a Temporal Court, and the Party prays a Prohibition, and whether the Defendant proceeded or not after the Prohibition, an Attachment goes to bring him into Court; if he has proceeded after the Writ delivered, that is a Contempt; but ſtill it is Matter examinable whether the Court have or have not a Juriſdiction; if it have not, the Court will finally prohibit and give Satisfaction to the Party; the Party is not to have Damages if they have Juriſdiction, but if they have none, they have acted againſt the Prohibition of Law, and done the Party wrong; *per* Ch. J. *Pratt.* Prohibition.

Herbert verſus *Dean and Chapter of Weſtminſter, Mich. 6 Geo.* I.

A Libel in the Court of the Dean and Chapter, which is a Peculiar, againſt Mr. *Herbert*, who had got poſſeſſion of the new Chapel, before *Broderick* the Commiſſary of the Dean and Chapter, who had a Leaſe of the Freehold of this Chapel from the Dean and Chapter, and after *Broderick* had brought an Ejectment againſt *Herbert* to turn him out; and the Libel was for preaching without Licence, and without any Pretence of Right to demand a Licence, and that *Broderick* might have Juſtice, and Mr. *Herbert* to be perpetually ſilenced; and this was for not having a Licence from them as Ordinary, having a peculiar Juriſdiction, as pretended. Licence to preach, by whom grantable.

Per Cur': Let there be a Rule for a Prohibition, becauſe this Suit was founded on no Canon; for, they could not mention one not to preach without Licence of the Ordinary, and the Act is Biſhop or Archbiſhop, and this was a Suit

clearly within the Act of Uniformity, ſo Remedy on that Statute, and it is a perſonal Power given to the Biſhop and Archbiſhop, and not to the Ordinary; ſo a Prohibition went *per totam Curiam.* Vide 2 *H.* 4. 15. againſt Preaching without Licence.

Archer verſus *Sweetnam, Hill.* 11 *Geo.* I.

Preſcription for Seats in Churches.

THO' Seats be pull'd down in a Church, yet a Preſcription to have a Seat remains to every one, ſo that if Seats be built up by the Ordinary where another had an antient one, or built on Part of it, it is illegal, and if the Spiritual Court interpoſe, a Prohibition lies.

The Defendant had as much Seat as ſhe had before, but not in the ſame Place, and all pull'd down without her Conſent.

Forty and *owbear, Mich.* 9 *Annæ.*

Church Rate variable.

A Rate made for erecting Galleries in a Church, and in the Libel it was ſaid it was rated according to an antient and ſtanding Rate, and to be *perpetua futur' temporibus.*

Per Parker Ch. J. and *Powell,* This old Rate is only a Meaſure to rate by; they muſt rate according to Exigencies of the Church, they are not bound to vary; the Difference is only in Expreſſion, they need not repeat over again; and they held Galleries might be erected, which was in the Nature of a new Floor, and would grant no Prohibition, tho' there was quoted, *Newcomb in Devon.* and *Noy*; why not Galleries as well as Bells?

Hunt and *Hargill, Trin.* 5 *Geo.* I.

A Libel in the Spiritual Court for Words, calling *Whore* in *London*, and the Defendant did not inſiſt on the Cuſtom of *London*, but went on to Hearing, and there was a Sentence, and then he moved for Prohibition; denied *per Cur'*, for the Court is not bound to take Notice of the Cuſtoms of any City or Town; they muſt be inſiſted on, as on a Return of *Habeas Corpus*, and coming after Sentence is too late.

The Court not bound to take Notice of Cuſtoms unleſs pleaded.

Cook and *Wingfield.*

FOR Words, *Strumpet* in *London*, tho' it appeared in the Libel to be in *London*, yet being after Sentence refuſed Prohibition, on the Reaſons and Authority of the above *Hunt* and *Hargill.*

Prohibition denied after Sentence.

Screen verſus *Cockernutt, Trin.* 2 *Geo.* II.

PRohibition for ſuing a Quaker in the Eccleſiaſtical Court upon *Stat.* 7 & 8 *W.* 3. *cap.* 34. for Repairs of the Church, the Act giving a Remedy before Juſtices of Peace; tho' the Juriſdiction of the Spiritual Court is not ſaved in the Act, yet the Court held a Prohibition would not lie, and that it is a new Remedy given by Statute, and the old one not taken away; which appears more fully *per Stat.* 7 & 8 *W.* 3. *cap.* 6. which gives the like Remedy for ſmall Tithes.

Quaker ſuable in Spiritual Court for Tithes or Repairs of Church, tho' Statutes give Remedy before Juſtice of Peace.

Sir

Sir H. Houghton verſus *Starky, Arm', Hil.* 4 *Geo.* I.

Coſts for Plaintiff in Prohibition.

A Prohibition concerning a Seat in a Church, and the Queſtion was, If the Plaintiff ſhould have Coſts in Prohibition, and from what Time? By the late Act which gives Coſts, 8 & 9 *W.* 3. *cap.* 11. if the Rule be diſcharged for a Prohibition it was agreed there could be no Coſts; the Commencement of the Suit is the Suggeſtion, (the Counſel urg'd), and therefore Coſts muſt be taxed from the Motion for a Prohibition; they compar'd it to *Habeas Corpus* and *Certiorari* and *Recordare*, the Expence of thoſe Writs is always allowed; as alſo of Ejectment; here is a new Declaration, the Words of the Act are [in all Suits upon Prohibition.]

In this Caſe, which was after a Verdict, they would have the Coſts limited from the Declaration; and cited a Caſe in the Common Pleas, *Willis* and *Brown* Plaintiffs, and *Turner & al'* Defendants, where they gave Coſts in Prohibition from the Motion, but in *B. R.* they gave Coſts only from the Declaration; but this Caſe was never moved there. All the Judges being met on another Occaſion, this Caſe was put, and they were all of Opinion that Coſts ſhould be tax'd from the Motion, and Suggeſtion for a Prohibition. Lord *Parker* then Ch. J. ſaid this was like a Petition, which formerly was exhibited for an Original; it all concerns the Prohibition, and is Part of the Suit, and indeed an Original is rather a Commiſſion for the Court to iſſue other Proceſs; and the Court of Exchequer, purſuant to this Reſolution, ordered Coſts to be taxed from the Motion and Suggeſtion in this Prohibition. 8 & 9 *W.* 3. *cap.* 10. *ſect.* 3. *Vide Ede* and *Jackſon*, if Damages in Prohibition.

Jeffs verſus *Bolton, Mich.* 5 *Geo.* I.

A Prohibition to ſtay Proceedings in Common Council touching the Election of Common Council-men, and *Jeffs* and *King* declared in Prohibition that the Plaintiffs were elected, and admitted Common Council-men for *Tower* Ward; and that the Defendants *Bolton* and *Bridgden* intending to draw the Examination of that Election into the Common Council, did exhibit a Petition for that Purpoſe to amove the Plaintiffs; whereas in Truth the Common Council have not any Juriſdiction whatſoever, to hear, determine or judge, concerning the Election of any of the Common Council, but that Time out of Mind the Examination of ſuch Elections belonged to the Court of Aldermen, and not to the Common Council.

A Replication which purſues the Declaration, is no Departure.

The Defendants plead, That Time out of Mind the Common Council have had the Examination of ſuch Elections; *abſque hoc*, that the Court of Aldermen have the Cognizance and Examination of ſuch Elections.

The Plaintiffs reply, and ſay, That the Common Council have not Time out of Mind had the Cognizance and Examination of ſuch Elections, and offer an Iſſue, but the Defendants did Demur.

And *per Cur'*, This is a good Replication; for, the Point is, Whether the Common Council have ſuch a Juriſdiction? and not whether the Court of Aldermen have it, which is not material; and if Iſſue had been joined on the Juriſdiction of the Court of Aldermen, it would have been immaterial on both Sides; the Queſtion therefore, the Right of Common Council is to be Travers'd; for, if they have no Right, then the Prohibition muſt ſtand; if they have, a Conſultation muſt go; ſo tho' it be a Traverſe upon a Traverſe, yet it is good, becauſe the Defendant has made an immaterial Traverſe; and in Prohibition both Parties are Actors, and the Defendant is to ſet out a Title to have a Conſultation; and the

A Traverſe upon a Traverſe.

In Prohibition both Parties are Actors.

the Plaintiffs here have not deſerted their Point, but purſued it, which is, that the Common Council have no Juriſdiction, and the Defendant has thrown in a Matter totally immaterial, which is, Juriſdiction of the Court of Aldermen.

This Cauſe came by Writ of Error into the Houſe of Lords, and none appeared for the Plaintiff in Error, and ſo Judgment was affirmed, and 30 *l.* Coſts in each Cauſe, being two of them; and the Lords ordered a Committee to examine what Sums of Money had been ordered or iſſued out of the Chamber of *London* to defend or maintain theſe Cauſes, or any other of the like Nature, and upon whoſe Application, and by whoſe Direction? For, Lord *Sunderland* ſaid, he had heard this Cauſe was carried on by the City of *London*, and not by *Bolton* the Plaintiff in Error, who ſaid, when he was ſerved with the Order of the Houſe of Lords, that it did not concern him, for that he was not, nor had been at any Expence.

Stratford and *Neal, Mich.* 8 *Geo.* I.

Prohibition in a Suit for Agiſtment of dry Cattle, Conſultation granted. 1 Mod. Ca. 1.

PRohibition in *B. R.* in *Ireland*, on a Libel for the Agiſtment of Oxen, Horſes and Colts, Suggeſting they were fed with Hay that had paid Tithe, and in Fields that had done ſo too, and Iſſue join'd upon thoſe Points, and found for the Parſon, but all the Iſſues were immaterial, and Negatives pregnant; as that all the Cattle were not ſo fed, nor were ſo fed for all that Time; and a Writ of Error was brought in the King's Bench in *England*, and Judgment given for the Defendant that a Conſultation go generally.

1ſt *Exception*, That the Refuſal of the Plea in Spiritual Court was not traverſed; *per Cur'*, that is only Form and Surmiſe to bring the Point in Queſtion, but not Subſtance.

2d *Exception*, The Iſſues are immaterial; ſo not help'd by any Verdict; but *per Cur'*, the true Point is, whether the Spiritual Court hath Juriſdiction, or not; and if it appear they

they have Juriſdiction, a Conſultation muſt go, tho' the Iſſue be againſt the Parſon and immaterial.

3d *Exception*, No Verdict is found as to the Contempt; ſo the Controverſy is not determined; but *per Cur'*, this is no material Point, the Point is, whether they have Juriſdiction or not; and the Attachment for the Contempt, was only the antient Way to bring the Juriſdiction in Queſtion, as on the Iſſue in *Son aſſault demeſne*, or other Actions of Treſpaſs of *Vi & Armis*, held not to be material, and it was ſaid this was different, but the Court did not think ſo.

4th *Exception*, Judgment was generally for a Conſultation, whereas the Plea was only for *duæ partes*, not ſaying Two Third Parts; held well, becauſe a Conſultation muſt go according to the Libel, which was for Two Third Parts; I thought *duæ partes* in a Conveyance or Grant might do for Two Third Parts, but never in Pleading.

5th *Exception*, Becauſe the Judgment is wrong, which is *Nil Cap' per billam*, and it ſhould be *quod le Deft' eat inde ſine die*; but *per Cur'*, it is right, becauſe the true Judgment is, that a Writ of Conſultation be granted, and there is that Judgment beſides the *Nil Cap' per billam*.

Savil and *Savil*, *Trin.* 10 *Geo.* II.

BY the Word *Lands* an Advowſon will not paſs, but by *Hereditaments* it may. On a Caſe made out of Chancery. Advowſon, what Word paſſes it.

Turner and *Hawkins*, *Trin.* 4 *Geo.* I.

THIS was Debt on Bond of 500 *l.* entered into by the Defendant, who was the Parſon, to the Plaintiff, who was the Patron of *Water-Newton* Church in *Huntingdon*, upon Condition that the Defendant, after Induction, ſhould at any Time, on the Requeſt of the Plaintiff, his Heirs or Aſſigns, Reſignation Bonds are allowable.

Aſſigns, Patrons of this Living, made to Defendant, abſolutely reſign ſuch Rectory into the Hands of the Biſhop of *Lincoln* which then ſhould be; the Defendant pleads the Bond was given to compel him to reſign, in Caſe he would not permit the Plaintiff to enjoy Part of the Glebe, and Iſſue was tendered, and a Demurrer.

Per Cur': Theſe Bonds, tho' to reſign generally, are good, and have been ſo allowed conſtantly, and there are many Caſes of it, becauſe they may be on good and valuable Conſideration and not Simoniacal; as in Caſe he takes a ſecond Benefice, or for Non-reſidence, and a Court of Equity will inſiſt on theſe Bonds where made on good Conſideration.

Selleck verſus *Biſhop of Exon, Paſch.* 5 *Geo.* II.

In *Quare Impedit*, both are actors.

MOVED that Defendant might have a Writ to the Archbiſhop in the firſt Inſtance, tho' no Default in Plaintiff; and Practice of Court of *C. B.* is, that in *Quare Impedit* both are actors, ſo that the Defendant may carry it down by Proviſo the firſt Aſſizes, and here the Plea was *in literatura minus ſufficiens*, and Iſſue taken thereon.

Idem verſus *Eundem, Mich. 6 Geo.* II.

THIS Writ, and the Return by the Archbiſhop of *Canterbury* were brought into Court, and the Return was *in literatura minus ſufficiens.*

Atkyns and *Berwick & al', Paſch.* 5 *Geo.* I.

THE Defendants, being Mercers and Partners, ſold Goods to *J. S.* (who was afterwards a Bankrupt) and the Goods were delivered, and the Defendants gave Credit on their Books, *J. S.* was before that Time indebted to the Defendants; this *J. S.* afterwards ſends divers of theſe very Goods, before ſold to him, to one *Penhallow*, for the Uſe of the Defendants, but without their Knowledge, and then *J. S.* becomes a Bankrupt before Defendants had aſſented to the Delivery to *Penhallow*, which they did when the Bankrupt ſent them a Letter to that Purpoſe, which was after the Bankruptcy. The Aſſignee under the Commiſſion brings an Action againſt the Defendants as tho' theſe were the Bankrupt's Goods; but *per Cur'*, on firſt Argument, being a Caſe made at *Guildhall* before Lord Chancellor, when Ch. J. the Property of the Goods is alter'd by the Delivery to *P.* to Uſe of the Defendants, becauſe delivered on a Conſideration, which was a precedent Debt, and muſt be underſtood a Delivery of Goods in Satisfaction of a Debt, and an Aſſent ſuppoſed, till a Diſaſſent appears; and enures not as a Contract, for, none was made, nor as a Gift, for that is Fraud, but as Payment or Satisfaction, and muſt be applied by the expreſs Words, to the Uſe of the Defendants, and if they are Creditors, then it was proper to apply it that Way.

Delivery of Goods to a third Perſon, in Satisfaction for a Debt by a Perſon who after Delivery becomes a Bankrupt, good, tho' *Ceſtuy que Truſt*, not having Notice, did not aſſent until after the Bankruptcy. Ca. L. & E. 432.

Inces and *Hay, Trin.* 9 *Geo.* I.

DEBT on a Judgment of *Hilary* Term, and *Nul tiel Record* pleaded, and it appeared on a *Hilary* Roll to be a Declaration of *Hilary* Term, and that the Writ of Inquiry was *ret'* 10 *Paſch.* ſo it muſt be a Judgment of *Eaſter* Term, and when the Judgment was ſign'd was agreed not to be material, ſo held it was a Failer of the Record.

Failer of Record.

Ball verſus *Squarry, Mich.* 4 *Geo.* II.

Covenant.

YOU cannot take Advantage of any Covenant omitted in Plaintiff's Declaration, on an Action of Covenant without craving *Oyer.*

Williams verſus *Francis, Bail of Naſh, Trin.* 4 *Geo.* II. *C. B.*

Eſq; and Gent. no Variance.

SCire *facias* againſt Bail upon a Recognizance, and in the Recognizance it is *Thoma Naſh, Arm'*, and in the Record of Judgment there it is ſaid *præd' Thomam Naſh, Gent'*; and on *Nul tiel Record*, it was held *per Cur'*, this is no Variance, and it could not be pleaded in Abatement; and *Forteſcue* quoted *The Queen* verſus *Chapman*, Indictment for Aſſault and Battery verſus *eum* as *generos'*, and he pleaded he was an Eſquire and no Gentleman, and it was over-ruled *per Cur'*; and *per Forteſcue*, this is in the Addition only, and not in the Name, and they are the ſame, and every Eſquire is a Gentleman, and Gentlemen are called Eſquires.

Per totam Curiam, Alias dict' was not material, and it is no Part of the Addition, nor do they put it into Bail-piece.

Whitney verſus *Mulcaſter, Mich.* 5 *Geo.* II.

Surpluſage rejected.

AN Action of Debt upon a Judgment by Default in Debt, and the Judgment ſet out was, *quod* Plaintiff *recuperet debitum ſuum præd', ff.* 1200 *l.* and *dampna ſua ad* 50 s. *quæ habuit occaſione detentionis debiti illius pro miſis & Cuſtagiis*, without the Particle [&]; on *Nul tiel Record* pleaded, the Record produced was only of a Judgment of Debt of 1200 *l.* and 50 *s. pro damnis occaſione detentionis debiti ill'.* Objected, this was a Variance; but *per totam Curiam, Pro miſis & Cuſtagiis* is Surpluſage, and ought to be rejected. So they held it no Variance.

Bolton

Bolton verſus *Jeffs* } *Hill.* 5 *Geo.* I.
verſus *King qui tam,* } *in Prohibition.*

THIS was a Writ of Error in Parliament on a Judgment on Demurrer in the King's Bench, and the Attornies on both Sides examin'd the Tranſcript by the Original Roll in the King's Bench, which was read in Court on making it a *Concilium*, and when the Chief Juſtice carries up the Tranſcript he carries up the Original Roll, that the Clerk of the Lords Houſe may examine the Tranſcript with the Original Record: After the Tranſcript had been examined, one *Parker*, who is Clerk of the Outward Treaſury, carried the Original Record, which was a looſe Roll, in his Pocket, and between the *Niſi prius* Office and the Coffee-houſe the Roll was pick'd out of his Pocket; now this Roll was a looſe Roll, and never bundled up with the Reſt, but was brought to him, in Order to have it bundled up and put into the Treaſury, but always remain'd at his Chamber, and was never carried to Treaſury. Chief Juſtice *Pratt* order'd a new Roll to be made, but would not carry it to the Lords, but Lord Chancellor *Parker* told the Lords of the Accident, and deſired the Lords, that the Chief Juſtice might acquaint them, and ask their Direction; and when the Chief Juſtice had open'd the Matter to the Lords, they directed a Committee to inquire into it, and they reported the Matter, and the Houſe agreed the Tranſcript ſhould be brought in (being in *Michaelmas* Vacation) to the Houſe of Lords, and the Plaintiff ſhould aſſign Errors to loſe no Time, and ordered the Court of *B. R.* to be moved the firſt Day of Term to cauſe a new Roll to be made; it was mov'd accordingly.

Looſe Roll loſt, how ſupplied?

And *per totam Curiam*, Let a new Roll be made by the Paper Books, which are the Originals; for, this was never a Record, being never bundled up, but only carrying it to the Treaſury; the Court has Power over the Records of their own Proceedings; and there was quoted Lord *Macclesfield*'s Caſe; and the Maſter of the Office ſaid it was common for him to cut a looſe Roll to pieces if ill wrote, and order a new

new one; or if by Accident Ink were ſpilt upon it, and ſo the Roll defaced, to order a new one; and the Maſter ſaid if he had been in Town he would have ſet every Thing right.

Nicholſon and *Simpſon*, *Paſch.* 6 *Geo.* I.

Variances, between a Condition and a Conviction, helped by Averments which were not traverſed.

DEBT on Bond with Condition, reciting that *H. Simpſon* was convicted at the Proſecution of the Plaintiff, for unlawfully killing a Deer on a Place called *Whinny Rig Ground* in the Pariſh of *Clifton*, in a Chace of the Earl of *Thanet*, about the 6th of *Auguſt* laſt, and that it was remov'd by *Certiorari* into *B. R.* that if *H. Simpſon* pay the Proſecutor Coſts and Damages in a Month after the Conviction confirmed, a *Procedendo* granted, *&c.* after *Oyer* of the Condition, the Defendant pleads, that the Conviction in the Condition mentioned of ſaid *H. S.* at the Proſecution of ſaid *N.* for the unlawful killing *unius cervi*, *Anglice* a Red Deer, in the ſaid Place in the Condition mentioned, called *Whinny Rig Ground*, in the ſaid Pariſh, and within the Chace aforeſaid, about ſaid 3d of *Auguſt*, was never affirmed by the Court of *B. R.*

The Plaintiff replies, and ſets out the Information, by which it appears that the Conviction was for killing a Red Deer between the laſt of *July* and the ſixth of *Auguſt*, in a Chace of the Earl of *Thanet*, call'd *Eglebird*, alias *Whinfield* in the ſame Pariſh, where Red Deer are kept; that the Conviction was remov'd, and affirm'd *prout patet per Recordum*, and then avers, that the Defendant was never convicted of any one Red Deer in the Chace aforeſaid, or any Part of it, beſides that in this Conviction; and that the *Cervus* in the Condition and that in the Conviction is the ſame, and the killing the ſame, and that the Place called *Whinny Rig*, in the Condition mentioned, lies within the ſaid Chace call'd *Eglebird*, alias *Whinfield* in the Conviction mentioned, and not elſewhere; and ſo alledges the Identity of Perſons and Things in the Conviction and Condition.

The

The Defendant rejoins, and prays *Oyer* of the Records, and pleads, as before, that the Conviction was never affirmed, to which the Plaintiff demurs; and Objected, that here were Variances between the Condition and Conviction, both in Time and Place; as to the Time, the Condition is about the third of *Auguſt*, and the Conviction is between the laſt of *July* and the ſixth of *Auguſt*; and as to the Place, the Conviction is for killing in a Place call'd *Whinny Rig Ground* in the Chace of Lord *Thanet*, the Conviction for killing in the ſame Chace call'd *Eglebird*, alias *Whinfield*.

Per Cur': As to the Variances, they are help'd by the Averments, which might have been traverſed, and not being ſo, muſt be admitted to be true; and ſo gave Judgment *pro quer'*; but it was objected that no Breach was aſſigned. But *Quære*, if the Plea be good, becauſe it is ſaid the Conviction in the Condition mentioned, and yet deſcribes it wrong, and ſays, for killing of a Red Deer, and in the Condition it is ſaid for killing of a Deer. Juſt mentioned *per Eyre* and myſelf.

The King verſus *Pain*.

Time for, and Effect of Notice for Trial on Information for a Libel.

ON an Information for a Libel, there muſt be fourteen Days Notice of Trial, and his Notice of Trial is ſufficient for him to appear, and if he do not, the Recognizance muſt be eſtreated, tho' on ſuch Recognizance to appear *De Die in Diem*, the Party muſt have Notice to appear (unleſs in the ſaid Caſe) except the firſt and laſt Day of Term, when they muſt always appear, or the Recognizance is forfeited; *per Holt* Ch. J.

The King and *Ridpath.*

The Effect of a Recognizance to appear, given upon a Misdemeanor. Ca. L. & E. 152.

THE Defendant was taken up for a Libel, and brings *Habeas Corpus*, and enters into a Recognizance with his Bail to appear in *B. R.* the firſt Day of *Michaelmas* Term, *ad reſpond'*, *&c.* and not to depart without Leave of the Court, and to be of good Behaviour in the mean Time.

Mr. Attorney exhibited one Information the firſt Day of Term for a Libel called the *Flying Poſt*; on that Information the Attorney enters a *Nolle proſequi*, and the laſt Day of the Term files another Information for the ſame Libel, with another called the *Medley*, and on this laſt Information the Defendant was convicted; and having Notice to appear, and not appearing, it was moved to eſtreat the Recognizance, and *per Cur'*, it was eſtreated; for, tho' the laſt Libel was ſubſequent to the Recognizance, yet the Bail is for him to appear to anſwer to all Things to be objected to him; and tho' under *ad reſpond'*, *&c.* Treaſon may be included, yet it is all one; for he is only to appear under a certain Penalty of 300 *l.* for, theſe Recognizances are for certain Sums; but thoſe of the Plea ſide not ſo, and yet antiently Bail to an Action was ſpecial Bail to all Actions that Term, and is now common Bail. The *Nolle pros'* is no Bar nor Diſcharge, or Leave of the Court to depart; for it is only that the Attorney will not further proceed on that Information; the Information is diſcharged, but not the Perſon. Judgment is not *quod eat inde ſine die*, but *non vult ulterius proſequi, & ideo ceſſat proceſſus ſuper Informationem omnino.* It is no Breach of Behaviour, if ſo, there would be *Scire facias* neceſſary. Then *Harcourt*, the Maſter of the Office, went down to the Exchequer with this Eſtreat, inſtead of the puiſne Judge, and they would not receive it: Contrary to Uſage.

A *Nolle pros'* on one Information, does not diſcharge the Recognizance. The Effect of it.

Non-appearance is no Breach of Behaviour.

The King and *Marquis of Carmarthen.*

PEACE ſworn againſt Lord Marquis of *Carmarthen* by Mrs. *Hill Moreton*, his pretended Wife, and the Lord inſiſted on his Peerage, but it was over-ruled, and he gave a Recognizance in 200 *l.* and Bail in 100 *l.* when my Lord appeared the firſt Day of Term.

Privilege of Peerage, not allowed on Breach of the Peace.

Lord Duke of Leeds.

GUMLY one of his Bail deſired he might render my Lord in his Diſcharge, which the Court ſaid he might do, tho' the Party came in of himſelf; but the Recognizance not being there, it could not be done.

Bail may ſurrender ſuch Perſon, *&c.*

But *per Cur'*, Mr. *Gumly* may take my Lord into Cuſtody in the Interim.

Creed and *Lappan, Paſch. 6 Geo.* I.

A Releaſe was pleaded to ſeveral Promiſſes at the Time thoſe were laid to be made; and pleaded to an Action of Treſpaſs and Battery, but does not Traverſe that he was *Not guilty* at any Time after, and before the bringing the Action.

Plea to Action of Treſpaſs and Battery, what to Traverſe.

Ergo per Cur' held naught.

Chace verſus *Chace, Hill.* 2 *Geo.* II.

THE Executor of a Landlord, after the Death of his Teſtator, had Rent due, and Goods of the Tenant were taken in Execution, and the Executor gave Notice before the Removal of the Goods.

An Executor of a Landlord ſhall have the ſame Benefit of the Act, againſt an Execution, as the Teſtator might have had if living.

And

And *per Cur'*, An Executor ſhall have the Benefit of this Act as well as the Landlord himſelf; for it is an Intereſt veſted, as the Caſe of *Wyndham* and *Dalgrave*.

Waring and *Duberry or Newman, Trin.* 4 *Geo.* I.

So an Adminiſtrator, but muſt come before Execution executed.

Rep. Eq. 223.

GOODS were taken in Execution, and the Money levied, then Adminiſtration is taken to the Landlord, who died Inteſtate, and the Adminiſtrator mov'd the Court to have a Year's Rent.

Per Cur': He comes too late, and Fictions in Law by Relation will not deveſt an Intereſt veſted in a Stranger. *Stat.* 8 *Annæ, c.* 17. *p.* 245. Act of Diſtreſs and Sale. 2 *W. & M. ſeſſ.* 1. *cap.* 5.

Cooper verſus *Young*, 5 & 6 *Geo.* II.

In Debt for Rent, Entry and Seiſin by a third Perſon, no good Plea,

DEBT for Rent, and Plea that *J. S.* before the Rent became due, enter'd and turn'd him out of Poſſeſſion, and ſtill keeps him out, and that the ſaid *J. S.* a Stranger, was at the Time of his Entry, and now is, ſeiſed in Fee.

muſt ſhew an elder Title.

Per Cur': No good Plea, he muſt ſhew an elder Title, and he might be ſeiſed in Fee by Diſſeiſin; ſo *habens legalem titulum* has been held naught.

Idem verſus *Eundem, Paſch.* 8 *Geo.* II.

The like.

PLeaded that *W. C.* at the Time of the Leaſe was, and is ſeiſed in Fee, before the Rent became due.

Per Cur': This is wrong alſo; for it muſt be pleaded as Prior, and this is at the ſame Time, which is repugnant.

Nicols and *Newman, Paſch.* 3 *Geo.* II.

THESE Bonds are given to ſecure Pledges of both Sorts, Pledges to make a Return, and Pledges to proſecute, and Bonds are now in lieu of Pledges; this was Debt on a Replevin Bond brought by the Sheriff, and the Condition was to appear at the next County Court, and there to proſecute her Action with Effect, and that ſhe ſhall, and do make return of the Goods and Cattle, if return ſhall be adjudged by Law, and to indemnify the Sheriff for granting the Replevin and delivering the Cattle; the Defendant pleaded that ſhe did appear at next County Court and proſecuted there, and no Return was there adjudged; the Plaintiff replies there was a *Recordare facias Loquelam* into this Court, but the Defendant did not proſecute in *C. B.* but a Return was adjudged againſt her, and that ſhe had not returned the Goods.

The Effect of Replevin Bonds.

Per totam Curiam, It is a naughty Plea, for it is not enough to proſecute in the County Court, but ſhe muſt follow it, and if a Return be adjudged in any Court it is enough, for, the Condition is to go to the End of the Cauſe.

Horton verſus *Arnold, Trin.* 4 *Geo.* II. *C. B.*

THE Declaration in Replevin was, *Cepit in quodam loco, vocat'* a Barn, *Carectat' tritici in garbis.* Objected, that Sheaves of Corn could not be diſtrained, this being not for Rent, but for the Arrears of an Annuity; and a Cart-load muſt in this Caſe mean Quantities, and not a Cart loaded with Sheaves; for, Sheaves in a Cart may be diſtrained.

Diſtreſs of *Carectat' tritici* for arrears of an Annuity, good.

But *per Cur'*, the Word *Carectat'* ſignifies the Cart loaded with Sheaves, as well as a Cart-load, ſo a good Diſtreſs and a good Count.

Hornblower verſus *Grimes, Hill. 6 Geo.* II. *C. B.*

Plea in Replevin.

REplevin brought, and Avowry for Non-payment of Rent; a Plea in Bar was *De injur' ſua propria abſque hoc quod præd' Ric'us cepit bona & catalla præd', &c.*

Per Cur': Non cepit is no good Traverſe; he ſhould purſue his Title, and *De injur' ſua propr'* is enough.

The King verſus *Tucker, Paſch. 6 Geo.* I.

Return of Reſcue.

A Return of a Reſcue, and four Exceptions taken to it.

1ſt Exception over-ruled.

1ſt, That it is ſaid the Bailiff by Virtue of the Warrant took the Defendants and arreſted them, when by Law it is the Arreſt of the Sheriff; but it was over-ruled *per Cur'.*

2d Exception over-ruled.

2d, Not ſaid that the Defendants, who were Man and Wife, were in the Poſſeſſion of the Bailiff; but ſaid only that the Bailiff took and arreſted them, and being ſo arreſted and being in my Cuſtody they were reſcued out of my Cuſtody; this was held well *per Cur'*, for that *exiſtentes in cuſtodia* was an Affirmative.

3d Exception allowed.

3d, Objected, that in the Return it is ſaid that *Parker* and *Mary* his Wife *non ſunt inventi in balliva mea*, but do not ſay *quod uterque eorū' non eſt invent'*; and for this Cauſe the Return was quaſh'd; for tho' it was urged that this Part of the Return did not concern the Party injur'd, who was the Plaintff, yet *per Cur'*, we muſt judge upon the whole Return, and this is an Excuſe returned why he did not execute this Writ; and the Excuſe is not compleat, for, he might not be able to find the Wife, and yet might find the Husband, and the Difference is between an Affirmative and a Negative in the Nature of the Thing; if you affirm of many you affirm of each, but it is the contrary in Negatives.

4th, That it is not ſaid *Vi & Armis* they reſcued, but only *Vi & Armis* to the Aſſault; and for this I held the Return naught, *ſilentibus* the Reſt of the Court. To ſupport the firſt Reſolution, the Caſe of *The King* and *Maſcal Cooks* was quoted, which confirmed my Opinion alſo as to the *Vi & Armis.* 4th Exception not determined.

Makepeice and *Dillon, Hill.* 8 *Geo.* I.

MOTION againſt Under Sheriff *Greenaway*, for not returning a *Scire facias*; and it was inſiſted that being returnable at a Return Day and not at Day certain, he need not return it till 4° *Die poſt.* So the Court did nothing. Return at 4° *Die poſt.*

Mills Aſſign' Vic' verſus *Bond, Mich.* 7 *Geo.* I.

A Condition of a Bond was (in an Action upon a Bail-Bond) to appear *Die ſabbati prox' poſt Octab' pur'*, and the Term ended on *Friday*, which was the Day before; and this appeared in the Declaration brought by the Aſſignee of the Bail-Bond; and the Defendant pleaded *Nil debet* to the Bond, and the Plaintiff demurs. Bail-Bond to appear on a Day not in Term, ill.

Per Cur': *Nil debet* is no Plea to a Bond, but Writ to appear out of Term is a void Writ, and ſo is the Condition of the Bond; and ſo Plaintiff has no Cauſe of Action on his own Shewing. *Nil debet* no Plea to a Bond.

Watkins

Watkins verſus *Marſh, Trin.* 7 *Geo.* I.

Bail-Bond aſſignable tho' Defendant not arreſted.

AN Action was brought by the Aſſignee of a Bail-Bond on the new Statute 4 & 5 *Annæ Reginæ, p.* 239. and the Defendant pleaded that the Principal was not arreſted by the Perſon at the Suit of the Plaintiff by virtue of the *Latitat*, as in the Declaration mentioned; to which the Plaintiff demurr'd; the Defendant urg'd that there is a Condition precedent in the new Act, if the Party be arreſted; but Judgment for the Plaintiff.

Per Cur': The Defendant firſt pleads the Statute of *H.* 6. and ſays by Proteſtation that this Bond was taken *colore officii* of the Sheriff, and then pleads the ſaid Plea; the Words are, If any one ſhall be arreſted by Writ, Bill or Proceſs, and the Sheriff ſhall take Bail from ſuch Perſon againſt whom ſuch Writ, Bill or Proceſs is taken out, the Sheriff ſhall aſſign; ſo the laſt Words ſay only where a Proceſs is taken out, and it would be odd to ſay no Bail-Bond ſhould be aſſigned but where the Party is actually arreſted, tho' he ſhould appear without an Arreſt. The like adjudged in the Caſe of *Haley* verſus *Fitzgerald, Mich.* 12 *Geo.* I.

Hange, Aſſignee of Caſewell and Billers, verſus *Manning, Trin.* 8 *Geo.* I.

Sheriff may aſſign Bail-Bond, after he is out of his Office.

THE Plaintiff brings an Action on an Aſſignment of a Bail-Bond; the Defendant pleads that at the Time of the Aſſignment they were not Sheriffs, but out of their Office, and two others were Sheriffs at that Time; the Plaintiff demurs; Judgment for the Plaintiff, it was a good Aſſignment, and a good Deſcription of the Party and Sheriffs.

Belgardine verſus *Preſton*, *Paſch.* 8 *Geo.* I.

DEBT by an Aſſignee of a Bail-Bond, the Writ appear'd to be returnable *Oct' Hill.* which was the 23d of *January*, and the Bail-Bond ſaid to be taken the 17th of *December* before the Return of the Writ; Defendant pleads the *Stat. H.* 6. and that the Bail-Bond was taken, *ſſ.* at a certain Place, the 25th of *January*, after the Return of the Writ; *abſque hoc*, that the Bond was made the 17th of *December* at *Weſtminſter*. The Plaintiff demurs, and Judgment *pro quer'*; *per Cur'*, the Plea makes the Place where the Bond was made material, which the Court held to be naught.

Bail-Bond when and where it may be made.

And *per Cur'*, Tho' the Bond was made two Days after the Return of the Writ, yet it is good, becauſe the Defendant has four Days to put in Bail by the Practice of the Court, which the Court will take Notice of.

The Court will take Notice of its own Practice.

Peedle, *Aſſign' Vic'*, ver. *Chriſtmas*, *Paſch.* 12 *Geo.* I.

AN Action was brought on an Aſſignment of a Bail-Bond; the Defendant pleads the Statute *H.* 6. and ſays it was a Bond made for Eaſe and Favour, and ſo void; the Plaintiff demurs.

Stat. H. 6. &c. no good Plea to Action by Aſſignee of Bail-Bond.

Per Cur': It is no good Plea, for, ſince the Statute the Plaintiff ſets out the Proceſs and the Bond, and that the Bond was to appear only at the Return of the Writ, and the Defendant affirming it was a Bond for Eaſe and Favour, ought to have traverſed the Condition ſet out by the Plaintiff; alſo here are two Affirmatives only, which cannot make an Iſſue; and where a Condition of a Bond is ſet out, *ad reſpond'* the Plaintiff *de pli'to tranſgr' acetiam billæ pro* 200 *l.* and does not ſay *billæ ipſius* Plaintiff, yet it is well; for it cannot be a Bill to be exhibited by any other.

Gregſon verſus *Heather*, *Hill.* 13 *Geo.* I.

Action by Aſſignee of Bail-Bond where to be brought.

DEBT upon an Aſſignment of a Bail-bond was brought in *London*, and in the Declaration it appears the Bond was made in *Surry*, and that the Aſſignment by the Sheriff of *Surry* was laid in *London*, it was held well; for, the Action is brought on the Aſſignment.

Robinſon and *Taylor*, *Trin.* 13 *Geo.* I.

In ſuch Caſe, no need to name Witneſſes.

DEBT on Aſſignment of Bail-Bond, if there be a *Profert* to the Bond it is enough, and need not ſet down Names of Witneſſes.

Jenyns and *Gooſtrey*, *Hill.* 3 *Geo.* II.

Action by Aſſignee of Bail-Bond.

DEBT upon an Aſſignment of a Bail-Bond, and it appears upon the Face of the Declaration, that the Writ was an *Acetiam* for 30 *l.* and the Bail-Bond for 40 *l.* ſo the Bail was taken in a greater Sum than the Debt, againſt the new Act, and there was a Demurrer to the Declaration. 2dly, It was excepted, 1ſt That the Plaintiff has not ſet out that the Writ was indorſed, *ſed non allocatur.* 2dly That the Bail-Bond being more than the Sum in the Writ, makes the Bond void.

Whether Bail-Bond may be for more than the Sum in the Writ.

Per totam Curiam, If it were void, it ought to be pleaded, but this Bond is not void; and the Act only makes it a Miſdemeanor in the Officer, and the Act is only Directory, and the Court of Exchequer was of the ſame Opinion.

Nott verſus *Stephens, Hill.* 3 *Geo.* II.

By Executor of Aſſignee.

AN Action was brought by the Executor of an Aſſignee of a Bail-Bond; it was objected the Act ſays, the Aſſignee ſhall bring an Action. Judgment *pro quer'*; it is an Intereſt veſted, which will go to the Executor.

Fromanteel verſus *Williams, Hill.* 3 *Geo.* II.

Action by Aſſignee.

HERE the Statute of *H.* 6. and Statute *Geo.* 1. were pleaded, and Judgment *pro quer'*; and here the Indorſement of Writ was ſet out, different from the *Acetiam.*

Watkyns verſus *Harris, Hill.* 3 *Geo.* II.

The like.

DEBT *per* Aſſignee of *William Morris* Bailiff of the Liberty *Decani & Capital' Eccleſiæ Collegiat'* of *Weſtminſter*, inſtead of *Capituli Eccleſiæ, &c.* and Judgment *pro quer'*. Objected, not ſaid Aſſignment under Hand and Seal. Anſwer, it is ſaid in the Declaration, the Aſſignment was *ſigillat' & Atteſtat'*; it was held well, becauſe in the very Words of the Statute.

Mayhew verſus *Mayhew, Paſch.* 4 *Geo.* II.

The like.

NIL *Debet* pleaded to an Aſſignment of a Bail-Bond; held not a good Plea. Vide *Warren* and *Conſett, Trin.* 13 *Geo.* I.

Daven-

Davenport, Aſſign' Vic', verſus *Parker, Mich.* 4 *Geo.* II. *C. B.*

What Bail-Bond ſufficient.

THE Proceſs was in an Action of Trover *ad dam'* 100 *l.* and the Condition of the Bond was to appear *ad reſpond' de placito tranſgr' ſuper caſum ſuper aſs' ad dam'* 100 *l.* this was urged to be a Variance.

But *per totam Curiam*, (The Statute *H.* 6. being pleaded) there were only three Things required ſo as to make the Bond good, *i. e.* 1ſt, It muſt be by the Name of Office. 2dly, To appear at a proper Time. 3dly, At a proper Place. The *ad reſpond'* is only Surpluſage, and ſhall be rejected.

Ballantine verſus *Irwin, Mich.* 4 *Geo.* II. *C. B.*

What is not letting a Bailiwick to Farm.

DEBT brought by a Sheriff againſt his Bailiff, on a Bond given to the Sheriff to execute all Precepts, to arreſt without Fraud, to bring in Bail-Bonds, and to pay to the Sheriff or Under-Sheriff 1 *s.* and 8 *d.* as a Fee for every Defendant's Name in every Warrant in meſne Proceſs, and to do ſeveral other Things which belong to his Duty, to execute his Office faithfully, and to indemnify againſt Eſcapes. The Defendant pleads ſpecially to every particular Condition, that he had performed it, and pleads that he paid this 20 *d.* for every Name in every Warrant on meſne Proceſs. The Plaintiff replies that a *Capias* was taken out againſt *J. S.* and a Warrant granted, and he did not pay the 20 *d.* The Defendant rejoins the Statute 23 *H.* 6. and Statute 3 *Geo.* 1. that no Sheriff ſhall let or ſet Office of Sheriff, Under-Sheriff or Bailiff, to Farm, *&c.* Plaintiff demurs.

Held *per Cur'*, This is a lawful Bond of Indemnity to the Sheriff, and no letting to Farm, and the 20 *d.* is expreſly allowed as a Fee to the Sheriff for the Arreſt; beſides, nei-

ther of the Acts makes the Bond void for letting to Farm; beſides it is a Departure in the Defendant to plead firſt he had paid the 20 *d.* and then rejoin'd he ought not to pay it, and he pleads a Plea at Common Law, and then rejoins a Statute which is naught. Departure.

Cook verſus *Brockhurſt, Trin.* 5 *Geo.* II.

AN Action upon the Caſe againſt the Sheriff of *Middleſex* for an Eſcape, to which the Defendant pleaded *Not guilty*, and nothing appeared againſt the Sheriff, but that he took a Bail-Bond with one Surety only in the Bond, *viz.* the Party himſelf and another; and it was held well *per totam Curiam*; and as to his not appearing at the Day no Action will lie againſt the Sheriff, but he muſt be amerc'd. One Pledge is ſufficient, where Pledges are to be found. 10 *Co.* 100. 3 *Cro.* 624. 1 *Lev.* 86. So in Bail-Bond, if the Sheriff take one Bail, it is enough, tho' Words of the Act are ſufficient Sureties in the plural Number; but in the Caſe of a Bail-Bond, the Sufficiency of the Bail is not traverſable. Bail, how to be taken by Sheriff.

Vaus verſus *Hall, Hill.* 5 *Geo.* II.

CASE on an Aſſignment of a Bail-Bond, and it was ſet out in the Declaration that the Bond was aſſigned to the Uſe of the Plaintiff, whereas the Act is, ſhall be aſſigned to Plaintiff. Aſſignment to Uſe of Plaintiff.

But *per Cur'*, It is all one, and held well.

Ruſh Adminiſtratrix verſus *Ruſh, Paſch.* 6 *Geo.* II. *C. B.*

Action by Adminiſtratrix Aſſignee of Bail-Bond.

THE Plaintiff brought Debt upon an Aſſignment of the Sheriff to her, ſhe ſuing in the Original Action as Adminiſtratrix for a Debt of 20 *l.* and there was a Demurrer generally to the Declaration. It was objected for the Defendant, that this was an Aſſignment to her in her own Right, and ſhe muſt ſue in her own Name, and not as Adminiſtratrix, *ergo* it is wrong; becauſe the Action is brought in the *Detinet*, and not in the *Debet* and *Detinet*. 2dly, It is not ſaid to be a Bail-Bond, only ſaid that Bond was given to the Sheriff to appear, *&c.* and it has no Date, and the Bond is in the Penalty of 24 *l.* and the Writ but 20 *l.*

Bond good without a Date.

Yet *per Cur'*, Judgment *pro quer'*, for it muſt purſue the Nature of the Original Action, becauſe it will be Aſſets, and is not ſhewn for Cauſe that it was in the *Detinet* only, and a Bond is good without a Date, and as to the Sum in the Bond above the *Acetiam*, that makes not the Bond void.

Derby verſus *Roſe, Hill.* 8 *Geo.* II.

Bond to *Marſhal's* Court Priſon-Keeper, how to be pleaded.

BAIL-Bond was given to the Priſon-Keeper of *Marſhal's* Court, after *Oyer* of the Bond and Condition pleaded the *Stat.* of 23 *H.* 6. and pleads that *A. B.* ſued forth of the Palace of the King at *Weſtminſter* holden in *Southwark.* Objected to Plea, that it is not ſaid, that the Proceſs iſſued out of any Court, but only ſued forth of the Palace inſtead of the Court of the Palace; and held it was wrong, and the Plaintiff had Judgment on the Bond, tho' a *Marſhal's* Court Bond.

Darby

Darby verſus *Hamond, Paſch.* 8 *Geo.* II.

A Bail-Bond in the like Caſe, *i. e.* in the *Marſhal*'s Court. Objected, it does not appear in the Plea or Declaration, that the Bond was entered into to the Plaintiff by the Name of his Office, but only to *John Darby*, ſo void upon *Stat. H.* 6. The like.

But *per Cur'*, Here is no *Oyer* crav'd of the Bond, ſo the Original Bond may be right, *&c.* it does not appear to be wrong; then objected theſe Bonds were not within the Statute; but *per Cur'*, Judgment *pro quer'*.

Kendal verſus *Bromwich, Paſch.* 8 *Geo* II.

In the Exchequer Chamber.

OBjected, here is no Breach aſſigned, becauſe it is aver'd only that the Money was not paid to the Plaintiff; but it is not aver'd, the Money in the Bond was not paid to the Sheriff. *Lilly's Ent.* 172-3. Action by Aſſignee.

But *per totam Curiam*, It is well enough; for, the Sheriff had aſſigned it over, ſo the Judgment of *B. R.* was affirmed.

Neat, Aſſignee of the Sheriff of Middleſex, verſus *Mills, Mich.* 9 *Geo.* II.

IN the Declaration the Aſſignment of the Bail-Bond was ſet out to be atteſted in the Preſence of one Witneſs, naming him, *John Weaver*. On *Nil debet* pleaded, and Demurrer, it was held wrong; it ſhould be in Preſence of two Witneſſes by Statute; on this the Plaintiff did diſcontinue. Two Witneſſes neceſſary to aſſignment of Bail-Bond.

Wind-

Windham ver. *Palgrave, Mich. 6 Geo.* I.

A Statute how to be laid in the Declaration.

AN Action upon the Statute againſt removing Goods on an Execution, until a Year's Rent be paid, and it was laid that by a Statute made in a Parliament held the 8th of *July* 8 *Annæ* it was enacted, Whereas the Parliament begun the 8th of *July* in the 7th Year of Queen *Anne*, but was continued by Prorogations beyond the 8th Year; agreed if it went no farther it would be naught; as is 2 *Cro.* 111. but concluding *contra formam Statuti in eo caſu edit' & proviſ'*, it was well enough, and not tied up by the Words *ſecundum formam Stat' præd'*; for *præd'* would tie it up.

Ibbotſham verſus *Cook, Mich.* 5 & 6 *Geo.* II.

How pleaded.

THE Statute of 2 *Geo.* 2. intitled, An Act for the Relief of Inſolvent Debtors, was pleaded as a Statute made 29 *January* 2 *Geo.* 2. whereas it was at a Parliament begun and holden 23d of *January* 1727, 1 *Geo.* 2. and continued by Prorogations to the 2d of *January* 1728; held naught, and Judgment *pro quer'*.

Nutt verſus *Stedman, Hill.* 8 *Geo.* II.

The like.

A Statute of *W.* 3. intitled *An Act for ſupplying Defects in the Law for Relief of the Poor*, was pleaded as an Act made in the 8th and 9th Year of the Reign of *W.* 3.

Per totam Curiam, You ought to plead it of the 8th Year when the Seſſions began; for, in Law an Act cannot be made in two Years, and tho' ſo mentioned in the Statute Book, it cannot be good.

Oats and *Robinſon, Mich.* 8 *Geo.* I.

AN Extent on a Statute Staple was firſt taken out into the County of *Stafford*, and a *Liberate* was returned and filed, and after that, another Extent was taken into the County of *Nottingham* and a *Liberate* returned and filed; this appeared at a Trial, and a Caſe was made.

Leave given to iſſue an Extent upon a Statute Staple into all the Counties of *England*.
2 Will. Rep. 91.

Per totam Curiam, It was held that if the Party makes his Prayer into ſeveral Counties, he may have his Execution by way of Extent in all thoſe Counties; but here was no Prayer, ſo the Court gave Leave (being in the Caſe of a Statute Staple) to apply to the Court of Chancery, to give Leave to enter a Prayer in this Caſe in the Petty-Bag, and Leave was given, and a Prayer was enter'd in Form, into all the Counties of *England*, which was enough to warrant the Extents in theſe two Counties; and the Cauſe in Ejectment going down to be tried again, on producing a Copy of that Entry; I directed the Jury to find for the Plaintiff, which they did; and Judgment was entered accordingly.

Lord Cornwallis and *Hoyle, Mich.* 6 *Geo.* I.

A Writ of Inquiry was executed the 15th of *June*, which was on a *Sunday*; held naught, and that they might take Advantage of it on Writ of Error, tho' not aſſign'd for Error.

Sunday.

The King and *Banks, and Arthur, Mich.* 11 *Geo.* I.

Clerk to Commiſſion of Sewers.

ARTHUR was appointed Clerk of a Commiſſion of Sewers, by Surprize, and was turned out by ſucceeding Commiſſioners of Sewers, and Mr. *Banks* put in his Place, by an Order; *Arthur*'s Counſel moved for a *Certiorari* to remove theſe Orders; there was a Rule to ſhew Cauſe; and they would have made out their Titles by Affidavits; but the Court granted a *Certiorari* to remove the Orders, to ſee the Title, and if they ſaw Cauſe, they would order a Trial; and ſome of the Court ſaid it was like the Caſe of a Clerk of Peace: But *Quære*, Whether this Clerk to a Commiſſion be not only at Will.

James and *Parſons, Hill.* 2 *Annæ.*

Eſcape *Sunday.*

ONE was taken on an Eſcape Warrant on the *Sunday*; and it was mov'd to have him diſcharged; but the Court would not, becauſe the Act was made in purſuance of an old Authority, and to amend the Law.

Per Cur': Bring your *Audita Querela*; in the Common Pleas they are of another Opinion; we of this, that they may take him on *Sunday*, therefore let it come judicially before us; take out your *Audita Querela* immediately, and they ſhall plead *inſtanter*; this Act is made in purſuance of a former Reaſon of Law, when a Creditor might ſeiſe his Debtor, and ſo might a Sheriff on an Eſcape, tho' on a *Sunday*. The Act of 29 *Car.* 2. extends only to ſuch Proceſs as was at that Time when the Act was made.

Hargrave and *Taylor*, *Hill.* 13 *W.* III.

THE Declaration in Treſpaſs was delivered the Day before the Eſſoin Day, which was *Trinity Sunday*, held well enough, and the Rule of Reference was diſcharged. *Sunday.*

White and *Martin*, *Mich.* 8 *W.* III.

A Declaration was delivered on a *Sunday*; *Holt* Ch. J. ſaid it had been allowed, but that himſelf was never ſatisfied with it; and *Turton* ſaid, in the Exchequer they rejected a Declaration in Ejectment for that Reaſon; and *Eyre* ſaid it was abominable. *Sunday.*

Spicer and *Mathews*, *Mich.* 4 *Geo.* II. *Cam. Scacc'.*

INdebitatus Aſſumpſit was laid the 26th of *March*; Defendant pleads a Tender before the Action brought, *ſſ.* 2d of *April*; the Plaintiff replies, that after the Promiſe made in the Declaration, and before the Tender, he ſued a *Latitat* the 12th of *February* in the ſame Year, returnable, *&c. abſque hoc*, that the Defendant made a Tender before the 12th of *February*. Day, Writs, Pleading.

Per Cur': Judgment affirmed, which was *pro quer'*. The Day is not material, but if the Plaintiff and Defendant had agreed the 26th of *March* was the Day of making the Promiſe, on a Writ of Error no Court could ſuppoſe any other Day; but when the Plaintiff has expreſly ſaid that after the Promiſe made, the *Latitat* was taken out, he does affirm that the 26th of *March* was not the real Day, but only nam'd for Form ſake, for if Iſſue were taken on this particular Day it would not be material; and ſo *per totam Curiam* Judgment was affirmed.

Wood

Wood verſus *Ridge & al', Mich.* 5 *Geo.* II.

Tender pleaded after Imparlance, ill.

IT was pleaded by Executors to an Action upon a Promiſe that the Teſtator at the Time of Promiſe was ready to pay, and that the Executors from the Time of the Teſtator's Death were ready to pay, and now are, and that the Teſtator in his Life Time, on ſuch a Day, tender'd the Money, but the Plaintiff refuſed to receive it; this being pleaded after an Imparlance had by the Executors.

Cur' held it to be ill.

May verſus *Cooper, Mich.* 8 *Geo.* I.

Tender.

CASE upon a promiſſory Note dated the 21ſt of *July*, and payable ten Days after Date; the Defendant pleads a Tender the firſt day of *Auguſt*.

Per Cur': It is a Day too late, it ought to be paid within ten Days, this is after.

Rudge and *Onon, Paſch.* 5 *Geo.* I.

Count.

IN Battery two Counts, the Firſt was good, the Second was with a *Cumque etiam*, and intire Damages; Judgment was arreſted.

Rogers and *Gibbs, Paſch.* 3 *Geo.* II.

Count.

IN Aſſault and Battery there was *quod cum* in the Declaration; but *per Cur', diſſentiente Forteſcue*, this is help'd by the Writ, which is *quare* he did the Treſpaſs, which is affirmative; but *per Forteſcue* the Stile of the Writ, which is rather Interrogatory, cannot help the Stile of the Count, which ought to be poſitive and affirmative. Vide 2 *Bulſt.* 214.

Wyat and —— *Mich.* 12 *Geo.* I.

TRESPASS for taking away *diverſa bona & catalla*; Judgment arreſted for the Uncertainty. Uncertainty.

Luke and *Helmer, Trin.* 12 *Geo.* I.

TRESPASS *quare fregit* and *proſtravit* 100 *Cataractas vocat'* Wears *aut fenſur' ipſius* Plaintiff; the Defendant juſtifies the Treſpaſs in the Words of the Declaration by means of a Highway; on which Iſſue is joined, and Verdict for Plaintiff; and in Arreſt of Judgment objected, the Declaration was in the Disjunctive, ſo uncertain. Count helped by Plea.

But *per Cur'* held that the Plea taking Notice what a Wear and Fence was, and that they were the ſame, had made the Declaration good; and relied on a Caſe in *Lutw.* 1492. the Declaration was Treſpaſs for taking four *Pullos* generally, and the Defendant juſtified as here, and it was held the Plea made the Declaration good; *artem ſive myſterium*, the ſame Thing; Dr. *Bonham*'s Caſe, if only a Circumſtance; and it is only under the *Anglice vocat'* Wears or Fences. *Q.*

Read and *Marſhal, Hill.* 8 *Geo.* I.

TRESPASS brought by the Husband for entering his Houſe and keeping out the Husband 5 Months, and taking Goods to the Value of 10 *l. nec non de eo quod* he aſſaulted and beat his Wife, and took Goods of hers to the Value of 20 *l. ad dam'* 100 *l.* and 100 *l.* Damages were given; on Writ of Inquiry it was held well tho' the Wife did not join, and where the Action would ſurvive to the Wife, and no Damage to the Husband to beat Wife, unleſs *per quod conſortium amiſit* laid, yet good, becauſe only Aggravation. Baron and Feme. 1 Mod. Ca. 26.

Dix and *Brooks* cited 3 *Geo.* 1. False Imprisonment by Baron and Feme for imprisoning the Wife, *per quod negotia* of Husband were left undone *ad dam'* of both; held well, by way of Aggravation, but a Declaration singly for beating the Wife brought by the Husband, without *per quod consortiu'*, would not be good. 6 *Mod.* 127.

Goslyn and *Williams*, *Trin.* 5 *Geo.* I.

In Trespass Plaintiff need not make Title.

TRESPASS for breaking his Close; the Defendant pleads that long before, the Duke of *Beaufort* was seised in Fee, and did infeoff the Defendant to him and his Heirs, by Virtue of which the Defendant was and is seised in Fee; and the Plaintiff claiming the said Close by Colour of a Demise from same Duke for Life, by which nothing passed, entered into the said Close, on whose Possession the Defendant *tempore quo*, in the Close aforesaid, entered as he lawfully might. The Plaintiff replies *quod le Deft' de injur' sua propria, &c.* enter'd, and traverses, *absque hoc*, that the Duke of *Beaufort* did infeoff the Defendant *prout &c.*

Cur' held this to be a good Replication, tho' the Plaintiff shewed no Title in the Replication; for, he having the prior Possession, that is enough to maintain the Action, and if the Defendant have no Title, his Action lies; therefore it is enough to traverse the Defendant's Title; in real Actions where mere Right in Question only, it would be naught to traverse the Defendant's Title without setting forth his own. 27 *H.* 6. 1. 10 *Ed.* 4. 8. 3 *Cro.* 338. *Co. Ent.* 662.

Sparks versus *Keble*, *Mich.* 11 *Geo.* I.

Justification in Trespass. 1 Mod. Ca. 330.

TRESPASS *quare clausum freg'* and digging Soil, and that he broke and spoiled 1000 of the Plaintiff's Hop-poles there, and kept him out of Possession; the Defendant pleads *liberum tenementum*, and that the Poles were Damage-feasant, and so he distrain'd and kept them; the

Plaintiff demurs, and Judgment *pro quer'*; for, the breaking and deſtroying of the Hop-poles is not anſwered, nor could it be juſtified, ſuppoſing it was the Defendant's Land; it was naught, becauſe the Plea amounted to the General Iſſue, which was ſhewn for Cauſe.

Rains verſus *Orton, Hill.* 10 *Geo.* I.

TRESPASS for breaking his Wharf, and incloſing it with Rails and fixing Boards; Plea, that Time out of Mind *A.* being ſeiſed of ſome Houſes, that he and all thoſe, *&c.* had free Uſe of that Wharf, and juſtifies under him, that he could not uſe the Wharf, and by his Directions pulled down the Boards and Rails. The Plaintiff replies *de injur' ſua propr' abſque tali cauſa* he did the ſaid Treſpaſs, and pulled down the Rails, *&c.* and then goes on, *abſque hoc*, that *A.* and all thoſe whoſe Eſtate, *&c.* ought to have the Uſe of the ſaid Wharf, *prout &c.* and the Defendant demurs, and ſhews for Cauſe the Double Traverſe. Treſpaſs, Double Traverſe, ill.

Per Cur': Judgment for Defendant, for, firſt the Plaintiff traverſes all the Matters in the Plea generally, and then traverſes the Preſcription in particular, which was traverſed before in general. *Frogat*'s Caſe.

Carvil and *Manly, Mich.* 9 *Geo.* I.

TRESPASS and falſe Impriſonment firſt of *October*, 5 *Geo.* . and from thence for ſeven Months impriſoned; the Defendant pleads an Outlawry, and Warrant, by Virtue of which the Plaintiff was taken the ſame firſt of *October* at *York*, (the Impriſonment being laid in *Middleſex*) and continued in Priſon for the ſame Time, which Arreſt and Impriſonment *ſunt ead' inſult' & impriſonament' & detent', &c. abſque hoc quod culp' in Midd' ſeu alibi* out of *York* City, or at any Time before the Delivery of the Writ of Outlawry to the Sheriff, or after the Return of the ſaid Writ; to which Plea the Plaintiff demurs, and ſhews for Cauſe, that Juſtification in Treſpaſs and falſe Impriſonment by *Cap' Utleg'*. 1 Mod. Ca. 30.

that the Defendant does not aver that the *Cap' Utlagat'* was filed and remained of Record, and doth not ſay *prout patet per Record'*; and upon this, Judgment was given in the Common Pleas for the Plaintiff, that the Plea was naught, and on a Writ of Error brought in *B. R.* Judgment was affirmed; the Traverſe was held naught, *quæ eſt ead' tranſgreſſio* is good without any Traverſe; and he ſays firſt it is the ſame Impriſonment, *i. e.* for ſeven Months, and yet in the Traverſe, which is any Time before the Delivery and after the Return, ſo leaves out all the Time between the Delivery and the Return, which the Court of Common Pleas ſaid was incurable, ſo an ill Plea *per* both Courts. Vide *Courtney* and *Satchwel*, poſt.

Courtney verſus *Satchwell, Paſch.* 12 *Geo.* I.

Treſpaſs, Juſtification by Officer, &c.

ACTION of Aſſault, Battery and Impriſonment in *London* firſt of *April*; the Defendant juſtifies by Virtue of a Precept out of the Sheriffs Court in *London*, and that he took him on the 20th of *March* before, which is the ſame Aſſault and Impriſonment, and then traverſes, *abſque hoc*, that he was guilty at any Time before granting the Precept, or after the Return, or at any Place out of the Juriſdiction of the ſaid Court, *vel alibi vel alio modo*, &c.

And *per Cur'*, Let the Plaintiff have Judgment; for *quæ eſt ead' tranſgr'* is a Traverſe, and here is another expreſs Traverſe too, *abſque hoc*, and this is ſhewn for Cauſe, and it is impertinent; and they relied on *Lutw.* 1457, and on a Modern Caſe in *B. R.* of *Carvil* and *Manly*, ante.

Taylor verſus *Woollen, Paſch.* 2 *Geo.* II.

Repugnant Pleas.

TRESPASS, and a Plea of Juſtification for two Times; pleads one Title by Leaſe for Lives, and one Life living 12th of *July*, and yet as to 12th of *July* another Title and Seiſin in Fee, which is repugnant; and ſo naught.

Wright verſus *Penn, Mich.* 4 *Geo.* II.

AN Action of Treſpaſs was brought for breaking and entering an Houſe, and taking away his Goods and converting and diſpoſing of them to his own Uſe; the Defendant pleaded that he took them Damage-feaſant, and removed them to *communem venellam prope* the Houſe, and left them for the Uſe of the Plaintiff. Damage-feaſant pleaded in Treſpaſs, &c.

Cur': It is no good Plea; for, it is no Anſwer to the Converſion to his own Uſe, which he could not juſtify for Damage-feaſant; and *per Forteſcue*, you cannot put periſhable Goods into a Pound overt; at leaſt you ſhould give Notice, for it is a Pound covert; ſo Judgment *pro quer'*.

PRECEDENCE, &c.

OF THE

JUDGES.

Precedence of Judges, on Promotion to a ſuperior Court.

TERM. *Paſch.* 4 & 5 *Philip and Mary.* Judge *Dyer* was on *Monday* before full Term made Judge of the King's Bench, being then a Judge of the Common Pleas; and the Queſtion was, Whether by the Acceptance of this laſt Patent, the Force and Effect of the Former was not ceas'd? And held by the Majority of the Judges, it was gone.

Firſt, Becauſe an inferior Authority is taken away and ſunk by the ſuperior Authority, as a Benefice becomes void by the Incumbent's taking a Biſhoprick, ſo the Authority of the King's Bench drowns all other inferior Authority.

Secondly, Becauſe it is abſurd and impertinent for a Man to reverſe his own Judgment, as he ſhould do in this Caſe, if a Writ of Error was brought in the King's Bench of a Judgment in the Common Pleas.

Thirdly, The Stile of the King's Bench is, *Pl'ita coram Domino Rege, &c.* and not *coram Juſtic'*, as in other Courts, where a Man may have two ſeveral Powers and Authorities *ſimul & ſemel*, as a Juſtice of Peace and a Juſtice of *Oyer* and *Terminer*; for the Stile is all the ſame *coram Juſtic', &c.* And therefore it has been ſeen that a Chief Baron of the Exchequer and Juſtice of the Common Pleas have held thoſe Places together, as *Brook* in *H.* 8. and *Starkey* in *H.* 7. So

Knivet was Chief Juſtice and Chancellor together in *Edward* the Third's Time, but theſe vary from this Caſe. *Dyer* 159. So *Sanders* Chief Juſtice of *England* was made ſo from a Judge of the Common Pleas, but did not ſurrender his Patent, but it was a Surrender in Law, otherwiſe he would be intitled to the Fees of both Places.

Mich. 10 *Car.* 1. Sir *Robert Heath* was diſplaced from being the Chief Juſtice of the Common Pleas, and Sir *John Finch* the Queen's Attorney General put in his Place; the firſt Day of the Term he came to the Chancery Bar, and Lord Keeper *Coventry* made a Speech to him and he anſwer'd it; then he was ſworn a Serjeant, and a Day after that, counted at the Common Pleas Bar; then was ſworn Chief Juſtice, and a Day after, being attended by three Earls and forty Lords, Noblemen and others, and alſo with the Society of *Grays-Inn*, of which Houſe he was, and Inns of Chancery, went to *Weſtminſter*. 1 *Cro.* 375.

Sir *John Walter*, the Prince's Attorney General, and Sir *Thomas Trevor*, the Prince's Solicitor General, were called Serjeants, and had Writs returnable *immediatè* in Chancery; they appeared in the Vacation at the Lord Chancellor's Houſe, and were there ſworn; but, by all the Judges, ſuch Writs are not legal, for they are of ſo high a Nature, that ſuch Writs ought to be returnable at a Day certain in the Term; and therefore they had other Writs which iſſued accordingly; the firſt was made Chief Baron, and the other a Baron of the Exchequer. Sir *H. Yelverton* deſired to be excuſed of the Ceremony of walking to *Weſtminſter-Hall* when he was called a Serjeant; but by all the Judges he was refuſed, becauſe it is Part of the Ceremony, tho' the Example of Chief Juſtice *Coke* was quoted; but they ſaid no more ſuch Examples ought to be made. 1 *Cro. Pref.* 2, 3.

Serjeants Writs, when returnable.

The Perſons above went to *Serjeants Inn* where the Chief Juſtice was, and all the Judges, and Sir *Randolph Crew*, Chief Juſtice, made a Speech to them, and then they counted, and Coifs were put on, and then they went to their Chambers,

bers, while the Judges went to *Weſtminſter* in Party-colour'd Robes. *Id.*

Judges are Aſſiſtants in *Dom. Proc'.*

All the Judges are Aſſiſtants to the Lords to inform them of the Common Law, and thereunto are called ſeverally by Writ. 4 *Inſt.* 50. But it does not belong to them to judge of the Law or Cuſtoms of Parliament. *Parl. Roll* 5 *H.* 4. *p.* 12.

Decline giving Opinion on a Competition for the Crown.

The Duke of *York* put in his Claim in Parliament againſt the Title of *Henry* the Sixth, to the Crown, which was delivered to the Chancellor by way of Petition to the Houſe of Lords; on which the Lords ſent for the King's Judges to have their Advice and Counſel therein, and gave them the Petition and Claim, and required them in the King's Name to adviſe therein, and ſearch and find Arguments againſt this Claim for the King. The Judges in Anſwer the next Day ſaid, They were the King's Judges to determine Matters that were actually before them in Law, between Party and Party, and in ſuch Matters between Party and Party they could not be of Counſel, and that this Matter was between the King and the Duke of *York*, as Parties: Alſo it has not been accuſtom'd to call the King's Juſtices to Counſel in ſuch Matters; and eſpecially ſuch a Matter which was ſo high in its Nature, and touched the King's Eſtate and Royal Crown, which is above the Ordinary Common Law, and paſſed their Learning, wherefore they durſt not enter into any Communication about it; and therefore deſired to be excuſed. The King's Counſel and Serjeants were ſent to upon the ſame Account, and made the ſame Excuſe, but the Lords would not allow it, but ſaid they were the King's particular Counſel, and had their Fees for that Purpoſe, but would acquaint the King with their Anſwer. *Roll Parl.* 39 *H.* 6. 12.

22d of *December* 1718. On paſſing a Bill to repeal the Schiſm Act, the Judges were ordered to attend; and thereupon the Lords ſaid it was uſual to ask the Judges Opinions of the Conſequences of repealing or making any Law.

The firſt Queſtion ask'd, was, Whether Repealing the Act of Schiſm would take away the Biſhops Power of licencing School Maſters? The Judges anſwered, and ſaid the Law would ſtand juſt the ſame as to that, as it was before the paſſing the Act of Schiſm. And on Queſtions which may come judicially before them.

Second Queſtion, Whether the Biſhops, when this Act was repealed, would have the Power of granting Licences for keeping and teaching Schools? This was oppoſed by other Lords as what might judicially come in Queſtion in *Weſtminſter-Hall*; ſo the Lord Chancellor alter'd the Queſtion, and ſaid they only deſir'd to know the Facts, *i. e.* what Reſolutions had been, as to that Power in the Biſhops, in *Weſtminſter-Hall*; and the Judges ſaid that that Matter was not ſettled in *Weſtminſter-Hall.*

Third Queſtion, Whether the Act of Toleration had repeal'd that Clauſe in the Act of Uniformity, which gives Temporal Courts a Juriſdiction where Schools are taught without Licences? This was oppos'd as foreign to the Matter in Hand, and the Queſtion was put on it, and carried, that the Judges ſhould not be ask'd that Queſtion, becauſe it might come in Queſtion judicially before them the 7th of *January* 1718.

In the Caſe of Sir *John Fenwick*, who was attainted of High Treaſon by a Bill of Attainder, all the Judges met, *Holt*, *Treby*, *&c.* and alſo the Attorney General, to conſider of the King's pardoning the Judgment; and were all of Opinion that the King could pardon all or any Part of the Judgment; and in this Caſe all the Judgment in High Treaſon was pardoned, except ſevering his Head from his Body, and he was beheaded accordingly. *Vide* the Caſe of Lord *Bolingbroke*, in the Houſe of Lords, the 23d of *May* 1725. Of the King's pardoning Part of the Judgment in High Treaſon.

The Chief Juſtice of *England* once took Place of all the Noblemen in *England*; he is *Capitalis Juſtitiarius Angliæ totius*, and as the *Saxons* have it, Ealdopman, *Ealdorman*, *Aldermannus Angliæ totius*. *Hubert de Burgo*, in the 3d of King Lord Chief Juſtice of *England*, his Precedence of old.

John, was at once Chief Juſtice of *England* and had many other great Places. *Spelman*, Tit. *Juſticiarius*, Judges Commiſſions are *quam diu ſe bene geſſerint*; or as the *Scots* have it *ad vitam aut Culpam*. The King is called *Capitalis Juſticiarius Angliæ*. 20 H. 7. 7. 11 Co. 85. b.

Chief Juſtice *Huſſey* and the Reſt of the Judges met *a ſon Hotel*, at his own Houſe; which ſhews there was no *Serjeants Inn* then. 1 *H.* 7. 10.

Starkey was Chief Baron, and one of the Juſtices of the Common Pleas; and a Fine was levied before him one of the Juſtices of the Common Pleas and *Sociis ſuis*; and does not mention the Name of any other; this Fine is not good, for it cannot be levied before one, and more ſhall not be intended, becauſe not named. 1 *H.* 7. 10. The Judges met at the Church of St. *Andrew Holborn* to conſult about Law Matters, 2 *R.* 3. 11. The Judges aſſembled ſometimes at *Blackfriers* to conſult of Parliament Matters. As ſoon as *Henry* the Seventh came to the Crown, he conſulted and adviſed about the many Attainders there were at that Time, 1 *H.* 7. *Bacon's H.* 7. *fo.* 13. Sometimes they met at *Whitefriers* to conſult how they ſhould ſue for their Salaries, 1 *H.* 7. 3. Sometimes they met at the Church of St. *Brides* on a Queſtion propoſed by *Hobart* the King's Attorney General, about Crown Matters, 3 *H.* 7. 10. 2 *H.* 7. 2.

Salaries of Judges.

The Judges had an Act of Parliament for their Salaries, which were to be paid out of the Arrears of the Cuſtoms, by the Cuſtomers and Controllers of *London*, and it was enacted, They ſhould pay to the Juſtices out of the firſt Monies ariſing out of the Cuſtoms, and that they ſhould have their Proportion by the Day; and it was held the Cuſtomers were liable, tho' the King granted a Licence to ſome Merchants to retain the Cuſtoms in their Hands; they met at *Whitefriers* to conſider of this, and agreed to ſue the Cuſtomers, and a Bill was commenced, and a Demurrer, and then the Cuſtomers complied, 1 *H.* 7. 3.

This Act was made in *Henry* the Sixth's Time, but here was a Proviſo therein, that they ſhould not receive it out of the Cuſtoms, till it appear'd by the Chancellor's Examination of the Clerk of the Hamper that he had not ſufficient; and afterwards the Judges had a Privy Seal to receive their Salaries, for the mean Time between the Death of *Richard* the Third and the Date of the Patents in *H.* 7. as they had from the Death of *Henry* the Sixth to the Date of their Patent in *Richard* the Third's Time. *Id.* 4, 5.

The Chief Juſtice of *England* in *Henry* the Third's Time ſat ſometimes in the King's Bench and ſometimes in the Common Pleas as well as the King's Bench. 1 *Roll. Rep.* 16. 'Till the 16th of *Elizabeth* the Judges were allowed Diet in the Circuits by the Sheriffs, and they were allowed it in their Accounts; but then by a Letter from the Privy Council to the Sheriffs, reciting a Complaint of the great Charge and Expence of ſuch Diet, and that they increaſed in their Accounts; it was ordered by the Privy Council, that the Sheriff ſhould not be at the Charges of the Juſtices of the Aſſizes Diet, for that the Juſtices ſhould have Money from the Crown for their Diet; yet it is meant that the Sheriff ſhall aſſiſt the Servants of the Judges to make Proviſion for their Diet, and for Lodgings and Houſe-room at as reaſonable Charges as may be for the Queen's Service; that the Juſtices be favourably uſed in their Perſons and Trains; and by the ſame Letter, Notice was given to the Juſtices to begin to deliver the Gaol firſt before they proceed to the Aſſizes, that the Attendance of the Juſtices might not be ſo long, and directs the Sheriff to make ready the Priſoners, that the Judges may firſt finiſh that Service, being the principal Cauſe of the Seſſions. *Dugd. Orig' Juridicial'* 336. *Vide* 96.

Diet in Circuits.

Antiently the Judges being called by Writ, uſed to be cover'd in the Houſe of Lords as often as and when the Lord Chancellor put on his Hat; but now it is uſed that they do not put on their Caps until they are requeſted by the Lord Chancellor; and when call'd into the Star-Chamber, or to Errors in the Exchequer Chamber, they ſit cover'd with

When covered in *Dom' Proc'.*

with their Caps. In Lord *Audley's* Trial the Herald made Proclamation, that the Judges and all the Lords, not being Peers, and all the Privy Council ſhould be cover'd, but others not, tho' the antient uſe was for the Judges to ſit cover'd without this Ceremony. *Hutt.* 117.

No Prerogative to hinder the building Ships of War.

In *Michaelmas* Vacation 1721, the Judges were ordered to attend the Houſe of Lords, concerning the Building of Ships of Force for Foreigners, and the Queſtion the Lords ask'd the Judges was, Whether by Law his Majeſty has a Power to prohibit the Building of Ships of War or of great Force for Foreigners, in any of his Majeſty's Dominions? And the Judges were all of Opinion (except Baron *Mountague*) Chief Juſtice *Pratt* delivering the Opinion, that the King had no Power to prohibit the ſame, and declared, that *Mountague* ſaid he had form'd no Opinion therein. This Queſtion was ask'd on Occaſion of Ships built and ſold to the *Czar*, being complained of by the Miniſter of *Sweden*. *Trevor* and *Parker* gave the ſame Opinion in 1713.

Death of Sheriff of *London*.

27th of *February* 1723, Seven or Eight Judges met at the Requeſt of Chief Juſtice *Pratt*, concerning the Death of one of the Sheriffs of *London*, Sir *Felix Feaſt*, which happened juſt before the Seſſions at the *Old Baily*, and the Judges not agreeing whether the Under Sheriff could go on by the late Act, and it being a difficult Queſtion, Chief Juſtice *Pratt* mov'd to have the Seſſions adjourn'd, which was ſo, till another Sheriff was choſen.

The Lord Chancellor in the Caſe above ſeem'd to think that one Sheriff might act in the Caſe of the Death of the other, as the Chief Clerk in the King's Bench, where a Grant was to *Ventris* and *Holt* jointly; *Holt* died, yet *Ventris* did execute alone.

Conſtruction of the Black Act, as to Diſguiſe.

At the ſame Time Judge *Tracy* propoſed a Queſtion on Lord *Onſlow's* Caſe, which was a Conviction againſt the Defendant, one *Arnold*, for ſhooting at him, whether by the new Act he is required by the ſame to be in Diſguiſe, *&c.* and all the Judges held not, he ſaid, for, a new Clauſe is

begun, and it is Nonſenſe to apply Diſguiſe and Arms to writing a Letter, *&c.*

When King *James* the Firſt died, which was the 27th of *March* 1625, *Charles* the Firſt iſſued a Proclamation that all who had judicial Places, ſhould keep them till they had new Patents; but yet the Judges thought it ſafeſt not to intermeddle till they had their new Patents and ſworn anew. 1 *Cro.* 2. Demiſe.

The Judges ought not to deliver their Opinions before Hand in any Criminal Caſe that may come before them judicially; eſpecially in Caſes of High Treaſon, and which deſerves ſo fatal and extreme Puniſhment; for how can they be indifferent who have delivered their Opinions before Hand, without hearing of the Party, when a ſmall Addition or Subſtraction may alter the Caſe. *Hugh Strafford*'s Caſe mentioned by Lord *Coke*, he was attainted of High Treaſon by Act of Parliament, and after that was up in Arms againſt *Henry* the Seventh in the firſt Year of his Reign, and being defeated fled to a Sanctuary near *Abingdon* in *Oxfordſhire*; and the Abbot of *Abingdon* came to the Judges and ſhewed Letters Patent, that all inhabiting within ſuch a Diſtrict were ſubject to him and none elſe; but notwithſtanding that, they had taken him from this Sanctuary; and the Judges met about this, and debated the Matter, whether Sanctuary was to be allowed; and ſome of the Judges objected how can we debate this Matter which will come before us ſoon? and it is not good Order to argue this Matter, and give our Opinions, before it comes before us judicially. The Attorney General ſaid, if the King knew that the Sanctuary would ſave him, it ſhould not come before them, and therefore the King would know their Opinion before hand; but *Fairfax* and others ſaid it was hard to give their Opinions before hand; notwithſtanding that, they aſſign'd the Day after to hear the Abbot and his Counſel; but before they met, Chief Juſtice *Huſſey* came to Town, and went to the King and requeſted the Favour that he would not deſire to know their Opinions; for, he ſuppoſed it would come into the King's Bench judicially, and then they would do that which Judges Opinions in Criminal Caſes.

was Right, and the King accepted of it; and the Priſoner was brought up to the King's Bench to know what he had to ſay for himſelf, and he inſiſted on the Sanctuary and Letters Patent; and all the Juſtices met after to conſider of it. 1 *H.* 7. 25, 26.

On Trial of a Peer. On the Trial of a Peer in Parliament, the Opinion of the Judges is asked publickly in the Preſence of the Priſoner. 3 *Inſt.* 29.

The modern Practice. And yet in all Criminal Caſes, eſpecially High Treaſon, the Judges met at the Requeſt of the Attorney General to adviſe the King in thoſe Proſecutions; as on the Reſtoration the Judges met to conſult concerning the Proſecution of the Regicides, and the Attorney General made ſeveral *Queries*, not only in framing of the Indictments, but in relation to overt Acts and Evidence, in which all the Judges gave their Opinions. *Keyl.* 9, 10.

So on the Proſecution of *Francia* the Jew, for High Treaſon, who was to be tried by three of the Judges at the *Old Baily*, all the Judges gave their Opinions, and thoſe three that were to try him, the Attorney *Northey* and myſelf as Solicitor, were preſent. 3 *Geo.* 1.

Caſe of Ship Money. The Caſe of Ship Money, and the Judges Opinions thereon, is remarkable. The Act reciting that the Barons adjourned the Caſe into the Exchequer Chamber, and there it was argued and agreed by the greater Part of the Judges and Barons, that Mr. *Hambden* was chargeable with the Ship Money; that all the ſaid Judges having been formerly conſulted with by his Majeſty's Command, had ſet their Hands to an extrajudicial Opinion expreſſed to the ſame Purpoſe, which Opinion was inrolled in all the Courts of *Weſtminſter-Hall*, and according to the ſaid Agreement of the Juſtices, the Barons of the Exchequer gave Judgment againſt the ſaid Mr. *Hambden*. And it was enacted, That the ſaid Charge, called Ship Money, and the ſaid extrajudicial Opinion, and the ſaid Agreement or Opinion of the greater Part of the ſaid Juſtices and Barons, and the ſaid Judgment given againſt the

ſaid *Hambden*, were againſt the Laws and Statutes of the Realm, the Right of Property, Liberty of the Subject, and againſt former Reſolutions of Parliament, and the Petition of Right.

This amounts to no more than that their judicial as well as extrajudicial Opinions were againſt Law, not that they were againſt Law becauſe extrajudicial. *Ruſhworth's Appendix* 216.

After the Records were vacated, the Lords reſolv'd that the Reſolutions of the Judges touching Ship Money, and the Judgment given againſt Mr. *Hambden*, are againſt the great Charter, therefore void; and ordered that Vacats and Cancellations be made of the Reſolutions of the Judges, and of the Inrolment thereof. *Id.* 218. Ship Money illegal.

Lord *Clarendon*, when Mr. *Hyde*, carried up Articles of Impeachment againſt the Judges; in his Speech, he ſays nothing of Extrajudicial, as in his Hiſtory; he has laid them on pretty well, but does not blame them as Extrajudicial. *Id.* 238.

The Lord *Falkland*, in his Speech about Ship Money, ſaid the Judges had delivered an Opinion in an extrajudicial Manner, *i. e.* ſuch as came not within their Conuſance; they being Judges, but neither Philoſophers nor Politicians. *Id.* 242.

A Noble Lord, in his Speech to the Lords, told them that there was a certain Lord ſolicited theſe Opinions, and he ſeverally procured the Judges Hands, and as he got them he injoin'd every one Secreſy; and then after about a Year the King ſent by Letter for all their Opinions, which was produced by the other. *Id.* 249. And the Caſe put by the King was ſigned above and below, *Charles Rex.*

Lord *Clarendon* ſays nothing of theſe Opinions being Extrajudicial; but that they were Illegal; becauſe Reaſons of State were urged as Elements of Law, and Judgment of Law

Law grounded on Matter of Fact, of which there was neither Inquiry nor Proof. *Clarendon Vol.* 1.

Notwithſtanding the Opinion above, the Judges were left free, and this was acknowledged by two of the Judges in the Exchequer Chamber, who argued againſt thoſe Opinions, *viz. Hutton* and *Crook*, with this Proteſtation, that if there were any Miſcarriage it muſt fall wholly on themſelves, for the King was blameleſs, for his Majeſty's Carriage in this Buſineſs had clear'd his Juſtice. The Oaths of the Judges as they bind them to adminiſter Juſtice to the Subjects according to Law, ſo alſo as they are of the King's Council, by their Oaths they are bound lawfully to Counſel him. *i. e.* when their Opinions are demanded they are to deliver them according to Law.

Judges are of the King's Council.

An extrajudicial Opinion condemned as High Treaſon. *Timp. R.* 2.

The Eleventh of *Richard* the Second, the Judges were ſent for to *Nottingham Caſtle*, where, in Preſence of the King they were commanded on their Allegiance to deliver their Opinions concerning a Commiſſion which was awarded in Parliament; they ſubſcribed an Opinion with the King's Serjeant, that this Commiſſion was in Derogation of the Crown, and that perſuading the King in Parliament to do it, was High Treaſon; this was condemn'd as High Treaſon in the next Parliament: This Opinion was extorted. *Ruſhworth Appendix* 261.

Ch. Juſtice ſworn.

Foſter, Chief Juſtice of the Common Pleas, was ſworn Chief Juſtice of the King's Bench, taking the Oaths of Allegiance and Supremacy, (which Oaths were read to him out of the Roll, and not out of the Lord Chancellor's Book), and being in Court, and not at the Bar.

At which Time alſo the eldeſt Serjeant put a Caſe to *Bridgman*, that was made Chief Juſtice of the Common Pleas, and he gave an Anſwer to it *Extempore*. 1 *Sid.* 3.

Where Law doubtful, Reaſon to prevail.

Where the Law is known and clear, tho' not Equitable, the Judges muſt determine as the Law is, but where the Law is doubtful they ought to judge according to what is moſt

Conſonant to Reaſon, and leaſt inconvenient. *Vaughan* 37, 38.

Ingham Juſtice, for altering and raſing a Record, in the Caſe of a Poor Man *qui finem fecerit pro quodam debito* at 13 *s.* 4 *d.* made a Razure of the Record, and *pro pietate fecit inde*, 6 *s.* 8 *d.* he was fined 800 Marks. 2 *R.* 3. 10.

The Diſcretion of the Judges ought to be thus deſcribed, *Diſcretio eſt diſcernere per legem quid ſit Juſtum*; this is prov'd by the Common Law, in the Caſe of a Special Verdict, *Et ſup' totam materiam petunt diſcretionem Juſticiariorum*; *i. e.* they deſire that the Judges would diſcern by Law what is juſt, and ſo give Judgment accordingly. 4 *Inſt.* 4. 12 *R.* 2. *cap.* 13. The Diſcretion of Judges, what?

The *Stat.* 20 *Ed.* 3. *cap.* 1. the Judges are to take no Fee but from the King to do equal Right and Juſtice, without regard to Letters or Commandment from the King or any other; and if any Letters come, the Juſtices are to proceed as if there were none ſuch; and they ſhall certify to the King and Council of ſuch Commandments; and there is the Judges Oath *quod vide*; and the Reaſon given, is, becauſe the King had increaſed the Fees of the Judges. The Judges are not puniſhable for what they do judicially, if it be done for want of Knowledge. 2 *R.* 3. 10. The common Faults of the Judges ſhall be tried by a Jury of 12 Men, and if they be convicted they ſhall loſe their Offices, and be fined to the King according to their Merit. *Id.* They are not to regard Letters, *&c.*

By 12 & 13 *W.* 3. intituled, An Act for further Limitation of the Crown, and ſecuring the Rights of the Subject, *cap.* 2. The Judges Commiſſions muſt be *quamdiu ſe bene geſſerint*, but the Judges are removeable by an Addreſs of both Houſes of Parliament, and their Salaries to be aſcertained and eſtabliſhed. *Vide* 1 *W.* & *M. cap.* 2. Continuance of their Commiſſions.

Juſtice *Croke* was continued a Judge, and his Attendance diſpenced withal; the like of Mr. Juſtice *Powell* of *Glouceſter*; and the like of Mr. *Smith*, Baron of the Exchequer, made

Lord Baron of *Scotland.* But Mr. Juſtice *Blencow* ſurrender'd and had a Penſion of 1000 *l. per Annum* only; ſo alſo Mr. Juſtice *Powis* and Mr. Juſtice *Tracy*, who had a Penſion of 1500 *l. per Annum*, paid during the Life of King *George* the Firſt, but refuſed to be paid in King *George* the Second's Time. Sir *William Ellis* was made a Judge of the Common Pleas, and turn'd out, and then reſtor'd, and had his former Precedency of thoſe who were put in ſince his Removal, and that Precedency was only by Verbal Signification from the King, and not expreſs'd in the Patent. *Raym.* 251.

Juſtice *Archer* was remov'd from the Common Pleas, but his Patent being *quamdiu ſe bene geſſerit*, he refuſed to ſurrender his Patent without a *Scire facias*, and continued Juſtice, tho' prohibited to ſit there, and in his Place Sir *William Ellis* was ſworn. *Raym.* 217.

Mr. Juſtice *Twiſden* was diſpenſed withal as to his Attendance, and had a Penſion of 500 *l. per Ann. Raym.* 475.

Lords Proxies.

Debated by Order of the Lords among the Judges and Civilians Attendants, whether if a Lord Grant to Three, jointly and ſeverally, to be his Proxy, and one conſent, and two diſſent, that be a good Voice; it was held no good one, and this Opinion was affirmed by the Lords. 4 *Inſt.* 13. In what Caſe the Lord High Steward is to be appointed, and where not. 13 *H.* 8. 11.

When to anſwer on Oath, or not.

On a Bill exhibited againſt Lord *Lincoln* in 1626, in the Star-Chamber, for Riots and Miſdemeanors, he put his Anſwer in on his Honour; and by all the Judges and Lords agreed it ought to be put in on Oath, eſpecially in Caſes Criminal, where the King is Party, and in all Caſes where they are to be Witneſſes between Party and Party they ought to be ſworn; and if a Peer affirm on Honour only, there is no Remedy, but if on Oath *econtra*, they may be proſecuted upon the Statute for Perjury; and it was ſaid this was *Juramentum purgationis*, and not *promiſſionis*, and Princes are ſworn to their Leagues. 1 *Cro.* 64. The Earl of *Lincoln*'s Caſe, 1 *Jones* 152. And an Attachment was granted againſt the

the ſaid Lord for a Contempt therein; there is firſt *Juramentum promiſſionis*, as Fealty to the King, to do his Duty in any Office, as Chancellor, Preſident, *&c.* all Lords are oblig'd to this. 2dly, There is *Juramentum purgationis*, when the Lord is charged to anſwer; and the Keeper of the Great Seal ſaid there were infinite Precedents, modern as well as antient, that Peers anſwer'd on Oath in the Star-Chamber and other Places: So if ſued in the Spiritual Court, they ſhall anſwer on Oath; and ſo if a Lord wage his Law, it ſhall be on Oath. 3dly, There is *Juramentum probationis*, when a Lord is produced as a Witneſs, he ought to be ſworn, elſe he is no competent Witneſs. 4thly, There is *Juramentum triationis*, there Lords are excuſed, as in the Aſſiſes, *&c.* yet if they ſhould be put on the Aſſiſes they muſt be ſworn; but the Lords are not ſworn where they try upon their Honour, becauſe they are Judges and not as Jurors. But in *May* 1628, Reſolved by the Houſe of Lords that the Nobility of the Kingdom, and the Lords of the upper Houſe of Parliament, are of antient Right to anſwer in all Courts as Defendants, upon Proteſtation of Honour only, and not upon the Common Oath.

30th of *April* 1723, On a Bill of Pains and Penalties, againſt *George Kelly*, the Lords ſeemed to agree that the ſame Rule as above extended to Lords Plaintiffs as well as Defendants, on Examinations on Interrogatories in Criminal as well as Civil Caſes; becauſe they cannot hurt others being no Evidence, but may hurt themſelves; but allow'd Lord *Townſend* and Lord *Carteret* to prove the Examination of one *Neyno* then dead, upon Honour, on a Queſtion, becauſe they acted in their Legiſlative Capacity and not in their Judicial. And it has been determined, that Peers may be bound to their good Behaviour.

Nota, Chief Juſtice of B. R.

The Chief Juſtice of *England* is called in old Hiſtories *Capitalis Juſticia & prima poſt Regem in Anglia Juſticia.* Lamb. Eirenarcha p. 4.

The Stile now of the King's Bench is *Pli'ta coram Domino Rege*; and in antient Records you will find the High Court of

of King's Bench and the High Court of Common Pleas, as well as the Expreſſion of the High Court of Chancery, and perhaps before it.

The King verſus *Layer, Mich. 9 Geo. I. B. R.*

Hab' Cor' ad teſtificand'.

THE Defendant on an Indictment for High Treaſon mov'd by his Counſel for an *Habeas Corpus* to bring up Lord *Orrery* and Lord *North* and *Grey*, then in the *Tower* for High Treaſon, *ad teſtificand'*; the Court refuſed to grant it without an Affidavit of the Priſoner who was to be tried, that they were material Witneſſes. *Eyre* Juſtice ſaid he never granted one in a Civil Caſe at his Chambers, without an Affidavit; and agreed a Judge might grant one at his Chambers on an Affidavit, and in a Civil Caſe, and ſaid that ſometimes they give Security. *Courtney*'s Caſe was remember'd in Sir *John Friend*'s Trial, and there was an *Habeas Corpus ad teſtificandum* granted at the *Old Baily*; but then the Court was ſatisfied he was a material Witneſs; and here a Commiſſioner was ſent to *Layer*, and he made an Affidavit to that Purpoſe. The Court declared their Opinion, there ought to be an Affidavit that the Perſon was a material Witneſs before an *Habeas Corpus* could be granted, elſe they may deliver all the Gaols in *England* on a bare Surmiſe; and a general Rule was made by the Court, that no *Habeas Corpus* of either Side, Civil or Crown, ſhould be granted without an Affidavit, that they are material Witneſſes, and bid the Officers take it down.

Judges conſtrue Statutes.

To the Judges belongs the Conſtruction of all Acts of Parliament, their Pronouncing the Law thereon, 2 *Inſt.* 611, 612. and altho' any Statute ſhould concern Eccleſiaſtical Juriſdiction, it is all one. In *H.* 2d's Time the Writs run thus in the Courts of *Weſtminſter*, *coram me vel Juſtitiis meis*; Vide *Glanvil*, but in *H.* 3d's Time the Term was changed from *Juſticiis* to *coram Juſticiariis noſtris*. Vide *Bracton*.

May

May 24, 1725. The Judges met by Order of the Houſe of Lords, to conſider of the Caſe of the late Lord *Bolingbroke*, in relation to his Pardon, which was ordered to be laid before the Judges, which was the Pardon of an Attainder by Act of Parliament, that being impeached of High Treaſon, if he did not appear by ſuch a Day, and abide his Trial he ſtood attainted of High Treaſon; all the Judges then in Town, which were eight, including Chief Juſtice *King*, gave their Opinion, that the King by his Prerogative could pardon an Attainder by Act of Parliament for High Treaſon, as well as where it is an Attainder at Common Law; that the Law made no Difference as to the Point of Pardon between one and the other. On the ſame Day the Lords asked the Judges in the Houſe of Lords this Queſtion, Whether this was a legal Pardon, or not? to which the Judges anſwered, by the Chief Juſtice (all agreeing) that this was a legal Pardon, and that they meant ſo by what they ſaid before. Attainder by Statute, pardoned.

Aſcenſion Day in *Paſch.* 1725, all the Judges met at *Serjeants Inn*, and agreed in the Caſe of Sir *Alexander Anſtruther*, that one Witneſs was enough in High Treaſon for waſhing Guineas with *Aqua Regia*; and held ſo in a Caſe in *Jones*, which is good Law. Coin.

AURUM REGINÆ.

Aurum Reginæ, what?

Aurum Reginæ is a Royal Debt, Duty and Revenue of every Queen Conſort of *England*, during her Marriage to the King, by the antient Law of *England* from every Perſon, both in *England* and *Ireland*, for every Gift or Oblation or voluntary Obligation or Fine to the King, amounting to ten Marks or more, for Privileges, Franchiſes, Diſpenſations, Licences, Pardons or Grants of Royal Grace, or Favour conferr'd by the King, which is a tenth Part, beſides the Fine to the King, *i. e.* one Mark for every 10 *l.* and 10 *l.* for every 100 *l.* and was uſually paid in Gold, as one Mark in Gold to the Queen, for every 100 Marks in Silver to the King; an Ounce of Gold at that Time a Day being ten Times as much in Value as an Ounce of Silver. And this becomes a Debt on Record to the Queen by recording the Fine to the King, without any Contract; and this by antient Preſcription, beyond the Memory of Man, in the firſt Age of the Law. This is prov'd from Records of the *Tower* and *Exchequer*, ſo antient as *H.* 2. in the Year 1177, and in that Age, it was ſaid to be *Secundum Conſuetud' Angliæ & Jura Scaccar'*, according to the Cuſtom of *England*, and Rights of the King's Exchequer, which may fairly be ſuppoſed to reach at leaſt to the Conqueſt.

Another Property of Queen Gold is, that tho' the King remit part or all of his Debt, or ſtay the Proceſs, yet this will not debar the Queen of her *Aurum Reginæ*, nor can the Proceſs be delay'd without her Conſent.

This is due from every one in *England* and *Ireland* both, and from the Clergy as well as the Laity, and iſſues out of the Fines of *Jews* and other Clippers and Falſifiers of King's Monies, and out of Fines to the King for Pardon of Malefactors, or for reſtoring Eſtates forfeited to the King.

Some will have it this had its Original from Queen *Helena*, Wife to *Conſtantius*, from the *Roman* Emperors, and not from the Earls or Dukes of *Normandy*, who were never Kings. Now the Wives of the Emperors had the Titles of *Diva*, and *Diva Auguſta*, as the Emperor had of *Divus*, &c. and *Conſtantius* kept his Court at *York*, and died there, and his Queen and Empreſs had Gold Coin ſtruck with her Effigies. *Seld.* tit. *Hon. part* 1. *cap.* 6. 8. 1.

Remedy for *Aurum Reginæ.*

The Queen has the ſame Prerogative of Proceſs out of the Exchequer, to recover her Queen Gold after her Husband's Death, accruing in his Time, as ſhe had while he lived.

Several Kings have ordered this to be levied, and ſometimes order'd Proceſs out of the Exchequer to levy all Debts due to her whatſoever; either Queen Gold or any Thing elſe. The Proceſs is *Fieri facias de bonis & catallis & de terris & catallis* at the Time of the Debt, in whoſe Hands ſoever it comes, and to deliver the Money to the Queen or to her Receiver, or Keeper at our Exchequer.

Keepers and Receivers.

The Queen, by her own Letters Patent or Writs during the Life and after the Death of the King, uſually conſtituted Keepers and Receivers of it in the Exchequer, whom the Barons were required to counſel and adviſe and aſſiſt on all Occaſions, for the levying this Revenue, and they were to cauſe Proceſs to Iſſue to levy this and other her Debts, and to render an Account of them in the Exchequer annually. The Queen had a ſpecial Officer and Auditor in *Ireland* as well as in *England*, to receive the Queen Gold.

The Queen appoints a Receiver General at the Exchequer, and neither Sheriff or Officer can be diſcharged till the Queen is ſatisfied as well as the King, and Money was ſaid to be paid *ad Receptam ſuam in Scaccar'*.

Clerks of her Writs.

The Queen conſtituted *J. S.* and *A. B.* Clerks of our Writs in the Exchequer at *Weſtminſter* and our Attornies, to demand and levy Queen Gold, and to proſecute and defend Suits for

us in the Exchequer, commenced and to be commenced. Given under our Signet at *Weſtminſter*; and the King ſends this by Writ, to the Barons of the Exchequer to admit them accordingly.

Another is appointed Treaſurer or Receiver General of Fee-Farms, *&c.* and of her Revenue of Queen Gold.

The Lord Mayor of *London* was fin'd for a Miſpriſion in *Edward* the Fourth's Time, 8000 *l.* and the Queen (*Margaret*) had 800 *l.* for Queen Gold.

It was received by Queen *Margaret*, Conſort of *Henry* the Sixth.

The Queen informs by her Attorney in the Exchequer.

The King iſſues Proceſs for Arrears due to the Queen, reciting it belongs to him. The Queen's Matters were always determin'd in the Exchequer as the King's.

In *Ireland.* *Philippa*, Queen Conſort to *Edward* the Third, complains of with-holding her Queen Gold in *Ireland*, and thereon a Writ iſſues by the King to the Officers, Treaſurers and Barons of *Ireland*, to levy it as uſually it had been, and as amply as in *England*; and recites that Defrauding the Queen was Diſheriſon to the King. The Officers, Sheriffs and Receivers of this Duty, did account to the Queen in the Exchequer for Debts due to her and levied, when they accounted to the King, and were fin'd and impriſon'd for the Neglect, and were not diſcharg'd, till Satisfaction given to the Queen, and acknowledg'd by her Attorney General.

THE GRAND OPINION FOR THE PREROGATIVE Concerning the ROYAL FAMILY.

The Proceedings before all the Judges of England, *and their Debates about the Grand Queſtion concerning the Marriage and Education of the King's Grandchildren, and each Judge's Opinion thereupon* ſeriatim.

THE Judges met on the 22d Day of *January* in *Hilary* Term in the fourth Year of his late Majeſty King *George*, and in the Year of our Lord 1717, at the Right Honourable the Lord *Parker*'s Chambers in *Serjeants Inn* in *Fleetſtreet*, he being then Lord Chief Juſtice of *England*, (afterwards Lord Chancellor of *Great Britain*) in purſuance of the then Lord Chancellor *Cowper*'s Letter from the King.

The Judges aſſembled by the King's Order.

The Judges being met, the Chancellor's Letter was read, which was to ſignify the King's Pleaſure, that all his Judges ſhould meet, with all convenient Speed, and give him their Opinion upon the following Queſtion, *viz.*

Required to give their Opinions.

The Queſtion.

" Whether the Education, and the Care of the Perſons " of his Majeſty's Grandchildren, now in *England*, and of " Prince *Frederick*, eldeſt Son of his Royal Highneſs the " Prince of *Wales*, when his Majeſty ſhall think fit to cauſe " him to come into *England*, and the ordering the Place of " their Abode, and appointing their Governors, Governeſſes " and other Inſtructors, Attendants and Servants, and the " Care and Approbation of their Marriages, when grown " up, do belong of Right to his Majeſty, as King of this " Realm or not?

A Meſſage to them from the Prince of *Wales*,

Soon after the Judges were met, they had a Meſſage ſent them, from his Royal Highneſs, *George*, then Prince of *Wales*, now King of *Great Britain*, by his Secretary Mr. *Molineux*, now deceaſed, and by his own Solicitor General, Mr. *Carter*, ſince Sir *Lawrence Carter*, a Baron of the Exchequer, to this Effect, That his Royal Highneſs the Prince of *Wales*, underſtanding that a Queſtion, relating to his Right of Guardianſhip to his Children was before them, deſired, that before any Determination was had upon it, they would give Leave that he might be heard by his Counſel concerning the ſame, and then the Meſſengers withdrew.

deſiring to be heard by Counſel.

After which the Judges having conſulted together about this Meſſage, agreed on this Anſwer, *viz.*

The Anſwer of the Judges that the King's Leave is neceſſary.

We have conſidered of what you have been pleaſed to propoſe from his Royal Highneſs the Prince of *Wales*, and we are all of Opinion, that in Caſes wherein our Advice is required by his Majeſty, we cannot hear Counſel without his Majeſty's Leave.

The ſame Meſſengers being called in again, the ſaid Anſwer was given to them by the Lord Chief Juſtice *Parker* in the Name of all the Judges.

They acquaint the Chancellor with the Meſſage and Anſwer, *&c.*

Thereupon the Judges agreed to acquaint the Lord Chancellor with this Meſſage, and with the Anſwer, in order to acquaint the King.

Immediately after this, without Loſs of Time, the Judges entered on the Conſideration of the Queſtion referr'd to them.

Blencow Juſtice: I don't ſee my Lords, but Marriage takes in the whole Queſtion, but let us debate the whole Matter minutely, and give our Opinions *ſeriatim.*

Dormer Juſtice, for the King: What is very material to this Purpoſe, is, the Marriage Articles of *Car.* 1. then Prince of *Wales*, with the Infanta of *Spain*, in the Life-Time of his Father, King *James* 1. under the Great Seal; one of thoſe Articles relates to the Education of the Iſſue of that Marriage, which was, that the Sons and Daughters, born of that Marriage, ſhould be under the Care, and brought up by the Infanta of *Spain* until the Age of ten Years; thereupon the Prince himſelf ſays, if they thought that Term was not enough, that he would intercede with his Father, the King, that the ten Years of the Education with the Infanta, might be lengthened to twelve Years. And ſays further, and I promiſe, and freely, and of mine own accord ſwear, if it happen that the intire Power of diſpoſing this Matter be devolved to me, I will approve of the ſaid Term of twelve Years; and theſe Articles were ſworn to by both King and Prince. *Ruſhworth* 86, 87.

Chief Juſtice *King*, afterwards Lord Chancellor, quoted *Rymer*, 4 *Tom. fol.* 605, 608. 8 *Edw.* 3. and *fol.* 620 and 624.

Precedents for the King. *H.* 3.'s Siſters.

Lord *Parker* Chief Juſtice: The Caſe of *H.* 3. is very material; the King's Siſter *Joan* was abroad, and with her own Mother in *France*, and yet the King here in *England* made the Match with *Alexander* King of *Scotland*; the King ſays *dabimus in Uxorem, Et nos & Concilium noſtrum fideliter laborabimus ad eam habendam.* Rymer 1 Tom. p. 240, 356. 4 H. 3. Anno 1220. *Et ſi forte eam habere non poterimus, dabimus ei in uxorem Iſabellam Junior' ſororem noſtram*; and many other ſtrong Expreſſions there are, as *maritabimus, et conceſſimus in uxorem*;

uxorem; *laborabimus per nos & Amicos noſtros.* Rymer, Vol. 1. 241, 407. Madox *Tit.* Aid 412. *H.* 3. had Aid to marry his Siſter. 12 *Co. Rep.* 29, 30.

Princeſs *Elizabeth*, afterwards Queen.

The King of *Sweden* was propoſed to the Lady *Elizabeth*, (afterwards Queen *Elizabeth*) for Marriage, but ſhe refuſed, becauſe it was not firſt communicated to her Majeſty the Queen. *Cotton's Records* 326.

Lady *Arabella.*

There is alſo the famous Caſe of the Counteſs of *Shrewsbury*, and ſhe was ſent to the *Tower*, and impriſoned there for a high Miſdemeanor and great Contempt, in being privy to the Flight of Lady *Arabella*, who being of the Blood Royal, had married one Mr. *Seymour* without the Conſent of the King, and he was likewiſe impriſoned in the *Tower* for that Marriage. *Co. Rep.* 12. *p.* 94.

Duke of *York*, afterwards King *James* 2.

In the Caſe of the Duke of *York*, being to be married to the Ducheſs of *Modena*, there was an Addreſs of the Houſe of Commons to the King, that he might not be married to that Princeſs; the King's Anſwer (which was remarkable) was, That the Marriage was compleated, and by his Royal Authority and Conſent. See Lord *Clarendon*'s Hiſtory.

Duke of *Glouceſter temp. W.* 3.

About *December* 1699, an Addreſs was moved for by the Houſe of Commons to the King, to remove the then Biſhop of *Salisbury* from being Preceptor to the Duke of *Glouceſter*, and it paſſed in the Negative, which ſhews the Parliament thought the Power to be in the Crown.

The ſame.

Another Inſtance is, the Caſe of the Earl of *Marlborough*; the King appointed him Governor of the Duke of *Glouceſter*, as a Mark of his Qualifications for an Employment of ſo great a Truſt, and as an Inſtance of this Prerogative.

Princeſs *Mary*, afterwards Queen.

So in the Caſe of the Marriage of the Princeſs of *Orange*, it was made wholly by the King, againſt the Father's Conſent.

In *Rymer*, *Tom.* 8. 698. there is a Power given by the King to certain Lords to treat of a Marriage of the King's Son, the Prince of *Wales*, with one of the Daughters of *John*, Duke of *Burgundy*, and Earl of *Flanders*. Cotton's Records 659.

Friday, *Jan.* 24, 1717. the Judges met again at the ſame Place, and thereupon the Paſſage in *Edw.* 5. was read out of *Kennett*'s Hiſtory of *England*, *viz.* The Queen continuing in the Sanctuary with her Son, the Duke of *York*, the Archbiſhop of *Canterbury* was ſent by the Duke of *Glouceſter*, and other Lords, to the Queen, to perſuade her to deliver up the Duke of *York*, or elſe they were to take him away by force. Duke of *York temp. Ed.* 5.

Here the Prince of *Wales*'s Secretary, the ſaid Mr. *Molineux*, attending the Judges, with Mr. Serjeant *Reynolds* the Prince's Counſel, ſent in to the Judges, and brought an Order with them from the King in the following Words. An Order from the King.

The King having been informed, that his Royal Highneſs the Prince of *Wales* deſired to be heard by his Counſel, his Majeſty's Pleaſure is, that any one ſingle Perſon that his Royal Highneſs ſhall think fit to appoint may apply to the Judges, and ſhall be admitted to lay before them what he has to offer in Behalf of his Royal Highneſs, in relation to the Queſtion before them. Upon this Mr. *Molineux* offer'd to come in, but he was refuſed to be admitted, becauſe he was not within the Order of his Majeſty, but Mr. Serjeant *Reynolds*, afterwards Lord Chief Baron, was admitted as Counſel for the Prince of *Wales*, according to the King's Leave, and argued as follows: That the Prince may be heard by one Counſel.

Reynolds Serjeant at Law, for the Prince: My Lords, I have Orders from the Prince of *Wales* to attend on a Queſtion relating to the Guardianſhip of his Children.

Whereupon the Lord Chief Juſtice *Parker* informed him exactly what the true Queſtion was, which was read to

him *verbatim*, though he confeſſed he knew what the Queſtion was before he came.

That the Guardianſhip of the Children belongs to the Father, and not to the Grandfather.

And then the Serjeant went on thus; The Guardianſhip of the Children of Right belongs to the Father. 3 *Co.* 37. *Ratcliff*'s Caſe. 2 *Roll's Abr.* 40, 41, 42. The Caſe of the Father and Grandfather is diſtinctly conſidered, and the Cuſtody appears to belong to the Father, and not to the Grandfather, and ſo is 30 *Ed.* 3. 17. *a.* and *Vaughan* 180. None can have the Cuſtody of the Son and Heir apparent but the Father. *Co. Litt.* 84. *a.* in the Caſe of younger Children the Argument is as ſtrong againſt the Grandfather, and ſo is 4 *&* 5 *Ph. & M. cap.* 8. Now why is the Power here ſuppoſed to be in the Grandfather, when 12 *Car.* 2. is poſitive that the Power is in the Father, and that the Father can appoint a Tutor and Guardian, and the Prince of *Wales* is within that Act? 2 *Roll's Abr.* tit. *Guardian*, *p.* 37. though the Prince is but a Subject, yet in Dignity he is made much greater, and ſuppoſed in ſome Caſes to be almoſt equal with the King, as *Seld.* tit. *Honour*, 495. So that the Reaſon ſhould be ſtronger for the Prince to have greater Power than ordinary Perſons have. Now as to *Bracton*, who treats of this Subject, that is tranſcribed from *Juſtinian*, therefore that Book and the Inſtance there ought not to be regarded, for he deviates from the Common Law, and is nothing but Civil Law. Vide *Selden's Diſſertation on Fleta.*

That *Stat.* 12 *Car.* 2. includes the Prince of *Wales.*

His Dignity.

Anſwer to *Bracton.*

There is little to be found in *Rymer* concerning this Matter, for there is no Inſtance where there is a Father and Grandfather alive together, but one in the 8th Vol. *Rymer*, *p.* 608. In *H.* 4th's Time, Grants were indeed made by the King for the Maintenance of the Earl of *March* in the Cuſtody of the Prince of *Wales.* But there is nothing here can eſtabliſh a Prerogative in the Crown. I have only looked over the firſt ten Volumes of *Rymer*, and ſhall not trouble your Lordſhips with Hiſtory, as that of *Ed.* 5. in *Kennett*'s Hiſtory, where the Queen ſaid that ſhe had adviſed with learned Counſel, and they told her that ſhe had the Right of Wardſhip to the Duke of *York.*

Earl of *March*, *Temp. H.* 4.

Duke of *York*, *Temp. Ed.* 5.

There is no Inſtance or Caſe whatſoever in any Law Book or Record, in the Caſe of the Crown, or indeed any where elſe, that the Cuſtody belongs to the Grandfather, nor was ever claimed or pretended to by the Grandfather. No Precedent for the Grandfather.

As to Marriage, every Man may marry his Daughter where he pleaſes; the antient feudal Law did extend pretty far as to Marriages. *Britt. cap.* 67, 68. *p.* 162. *b.* So is *Co. Litt.* 140. and never denied but only in the Caſe of a Widow holding of the Crown, who cannot marry without Leave of the Crown. *Mag. Cha. cap.* 7. 2 *Inſt.* 18. 6 *H.* 6. *Cotton's Records.* Marriage, when reſtrained by feudal Law.

Marriage always belongs to the Father, and the Prince of *Wales* here would be intitled to Aid *pur file marrier*; it is true the Statute of 28 *H.* 8. *cap.* 18. makes it High Treaſon to marry any of the Royal Family, but then this ſhews it was lawful before this Act, becauſe reſtrained by Act of Parliament, and now that Act is repealed. Marriage belongs to the Father.

Rymer, Vol. 4. 605, 608. which was in 8 *Ed.* 3. ſeveral procuratorial Letters *quantum in nobis* were granted to the Archbiſhop of *Canterbury* to marry, and in *page* 620. are procuratorial Letters, in the Caſe of *Edmund* Earl of *Cornwall*, *quantum in nobis* to be married. *Sandford* 216. *Temp. Ed.* 3.

There is one Inſtance indeed in *Rymer* of the Marriage of a Daughter in the Life-time of the Father, who was the King's Siſter, which is in Vol. 1. *Rymer* 407. and in 26 *H.* 3. *de matrimonio contrahendo, &c. promittimus & modis quibus poterimus laborabimus per nos & per amicos noſtros*, but this ſhews it was not done by the Prerogative alone, and indeed there is nothing to ſupport any Notion of that Nature. As to the Caſe in *Ruſhworth*, *page* 87, 88. concerning the Oath and Marriage Articles there mentioned, they were allowed to be contrary to the known Laws of *England*, and the Treaty therefore confirmed by Parliament. King *H.* 3.'s Siſter. Caſe of Prince *Charles* anſwered.

The

The Prince's Counſel, Serjeant *Reynolds*, having ended his Argument, withdrew: And then the

Duke of *York*, *Temp. Ed.* 5.

Lord Chief Juſtice *Parker* went on with the Caſe of *Ed.* 5. The Queen being in the Sanctuary, ſays, my Son, as my learned Counſel tell me, is my Ward, becauſe he hath no Lands by Deſcent holden by Knights Service, but only by Socage, and therefore to me by Law the Guardianſhip of my Son does belong. *Kennet's Hiſtory* 490. Then

Richard, Prince of *Wales*, *Temp. Ed.* 3.

The Story in *Ed.* 3. was read, to ſhew *Richard* the Second, then Prince of *Wales*, and Son of the late Black Prince, was in the Cuſtody of his Mother, for he was at *Lambeth* with his Mother, which is nothing to the Purpoſe. But what Brother *Reynolds* ſays about the Statue 12 *Car.* 2. it is neither Law nor Reaſon, nor is, or can the Prince of *Wales* be within that Act of Parliament.

The Prince not within *Stat.* 12 *Car.* 2.

Bracton.

As to the Authority of *Bracton*, to be ſure many Things are now altered, but there is no Colour to ſay it was not Law at that Time, for there are many Things that have never been altered and are Law now. And as to what is ſaid as to the Articles and Oath quoted out of *Ruſhworth*, their being againſt Law, that is only *gratis dictum*; for whether it was a fair Treaty or no, is not the Queſtion, for this Matter was only between the King and the Prince.

Prince *Charles.*

Price Baron: There is ſuch an Oath on the Occaſion of the ſaid Marriage as has been mentioned; but I do not know whether it has not been proteſted againſt: We muſt truſt to Collectors for theſe Articles. The Articles of Marriage of *Car.* 1. with *Henrietta Maria*, are in *Rymer*, *Vol.* 17. 673, 676. one of the Articles much like what was mentioned before, which was, that ſhe was to have the Nurture of her Children till 13 Years old, theſe Articles were agreed on in King *James*'s Time, 12 *Rymer* 658. The Prince's Counſel ſeemed to agree that Marriage and Education go together.

Prince *Charles.*

King

King Chief Juſtice of the Common Pleas, afterwards Lord Chancellor: In the Bill of Precedency it fully appears that the King's Grandchildren are Children; in the Caſe of Children of the Royal Family ſent beyond Sea, the King's Grandchildren are within that Law; ſo Prayers for the King and his Royal Family, includes all his Grandchildren, tho' the King had no Son living. The King's Grandchildren included in his Children.

Chief Juſtice *Parker:* The Law of God and Law of Nature are rather with the Grandfather, and the Succeſſion cannot be altered, for that every Man has a Right in the Royal Family.

Eyre Juſtice: It is the conſtant Cuſtom for all the King's Servants to ask the King's Leave to marry. *Rymer, Vol.* 16. *p.* 710.

Price Baron: There is no judicial Determination, nor any Caſe that comes up to this; the Queſtion here is, Whether this Power be in the King, excluſive of the Prince; if there be an ill King upon the Throne it may be very miſchievous. There is no judicial Determination.

King Chief Juſtice: The Queſtion is, Whether the King's Grandchildren can marry without the King's Leave; for the Father cannot compel them; it is impoſſible this Queſtion ever ſhould come into *Weſtminſter-Hall* to be determined there, and therefore to ſay there is no legal Determination, is to ſay nothing to the Purpoſe; this is in its Nature ſo great a Truſt that it cannot by the Conſtitution be lodged any where but in the Crown. It is impoſſible there ſhould be.

Parker Chief Juſtice: There is no Law againſt any one for marrying without the Father's Conſent, but the Crime is to marry any of the Royal Family without the King's Conſent; the King's Conſent was always held neceſſary, in the Caſe of Marriage of any of the Royal Family, always uſed and never conteſted; were it otherwiſe it would be ſetting up two independent Powers, and is a Truſt too big for any Subject. The King's Conſent neceſſary to the Marriage of any of the Royal Family.

Princeſſes of *Orange* and *Denmark.*

The Caſe of the Princeſs of *Orange*'s Marriage, and that of the Princeſs *Anne* of *Denmark*, are great Inſtances of the Power and Prerogative of the Crown; theſe Matches were publickly declared by the King himſelf, and againſt the Conſent of the Father.

Laws of *Scotland.*

Montague Baron quoted *Stairs* Inſtitutions of the Laws of *Scotland*, *fol.* 38. which agrees with *Bracton*, *lib.* 1. *cap.* 9. exactly, and with *Fleta*, *lib.* 1. *cap.* 6.

Richard, afterwards King *Richard* 2.

Eyre Juſtice quoted *Cowell's Inſt. tit.* 9. *p.* 14. *de patria poteſtate*, then he ſaid that *Edward* the *Black* Prince, diſpoſed of the Governance of his Son *Richard* of *Burdeux*, afterwards *Richard* 2. to *Simon Burleigh* made his Tutor at *Burdeux*. *Hollingſhead* 414.

And in the Caſe of the Counteſs of *Shrewsbury* no Offence was declared. *Hob.* 235. *Dugdale's Baronage.*

Dormer Juſtice quoted *Ruſhworth's Collect.* 1*ſt part*, 168. *Eachard* 974. *Bacon of Government fol.* 14. And in Lord *Clarendon*'s Hiſtory, Baby *Charles* is ſaid to be the Child of the Kingdom.

Then the Judges proceeded to give their Opinions *ſeriatim*, beginning from the Junior, which was Baron *Forteſcue Aland*, who had been Solicitor General to the then Prince of *Wales*, one of the firſt Officers in his Service, as follows.

Opinion for the King.

Forteſcue Aland Baron: My Lords, This is a Queſtion of great Importance to the whole Kingdom, and I am content for the better diſcuſſing it to divide it into two Parts, becauſe it has been ſo done by ſome of my Brothers, tho' I ſhould have thought that if the King has the Marriage of his Grandchildren, of neceſſary Conſequence he had their Education too.

I will then conſider firſt, Whether the King has the Care and Approbation of the Marriage of Prince *Frederick*, and his other Grandchildren, and whether of Right it belongs to his Majeſty, as King of this Realm, or not.

First Queſtion, Whether the King has the Marriage of his Grandchildren.

This Subject touching the Power of a Grandfather, may be treated of, either as a publick or a private Right; it has been treated of pretty much as a private Right by the two Judges that differ, and by the Counſel for the Prince of *Wales*, which I think is an Error, in the Foundation of their Argument; for it ought manifeſtly to be treated as *Jus publicum*, ſuch a Right as our Law Books expreſs it to be, *quod ad ſtatum Reipublicæ ſpectat*, and that makes it the King's Prerogative, and that is the King's Inheritance, as King of this Realm, which is too great a Point to be governed by the narrow Rules of private Property. Now to treat this otherwiſe, I think, is injurious to the Prince himſelf and all his Children; our Law Books ſay he is eſteemed as one neareſt to the King; ſo it has been determined in full Parliament, in the Caſe of the Prince of *Wales* in *H.* 6th's Time, and in his Patent which was made by Authority of Parliament in 34 *H.* 6. the Introduction of the Patent is, *Ut ipſum qui reputatione Juris cenſetur eadem perſona nobiſcum, digno prevenia-mus honore, &c.* ſo that in the Eye of the Law, they are to be reckoned but as one Perſon.

It is a publick Right.

Prince of *Wales Temp. H.* 6.

It is for the ſame Reaſon that an Act of Parliament which relates to the Prince, is a publick Law, of which every Body is to take Notice, becauſe whatever concerns the Prince, concerns the King, and whatever concerns the King concerns every Subject in *England*; and therefore the Act that relates to the Duchy of *Cornwall* has been held to be a publick Law. Now let us ſee what is ſaid in my Lord *Coke's* 8 *Rep.* called the *Prince's Caſe*, ſpeaking of the Prince: 'Tis ſaid, *Coruſcat Radiis Regis Patris, & cenſetur una perſona cum ipſo Rege.* So ſays Lord *Hobart*, who was the Prince's Chancellor, *Hob. Rep. p.* 226.

Statutes which relate to the Prince are publick Laws.

'Tis

High Treaſon at Common Law to imagine, &c. his Death.

'Tis for the ſame Reaſon, that it was High Treaſon, by the Common Law of *England* (before any Statute) to compaſs and imagine the Death of the King's eldeſt Son and Heir, who is generally made Prince of *Wales*, tho' now born Duke of *Cornwall* (but it is not ſo of a Collateral Heir to the Crown); and this Offence is called *Crimen læſæ Majeſtatis*, a Crime that hurts the Majeſty of the King himſelf. It follows then that as they are but one Perſon in Law, ſo in Point of Law they are ſuppoſed to have but one Will in relation to the Education, Marriage and Management of the Grandchildren; and the Prince of *Wales* in Point of Law is ſuppoſed in every Thing to concur with his Majeſty, which quite ſubverts and deſtroys the Diſtinction in common Perſons of Grandfather, Father and Son. Now the King as he is *Parens Patriæ*, he is alſo *Parens Nepotum*, Parent of his Grandchildren, as Lord *Coke* himſelf expounds the King's Nephew to ſignify his Grandſon, alſo from the *Latin*, *Nepos* which ſignifies both. So in the Caſe of a Queen Conſort, ſhe is the firſt Wife in the Kingdom, Epen *Quen* in the *Saxon* Language ſignifying Wife, and therefore by Reaſon of Excellence it was the Name for the King's Wife, who, conſider her in her private Capacity, as the private Wife of a common Subject, ſhe cannot ſue or be ſued by herſelf, nor cannot grant to or from her Husband; but then conſider her in her publick Character and Capacity, as a Queen, ſhe can ſue and be ſued by herſelf, and make Grants to and from the King her Husband, by her Prerogative; and antiently ſhe had a great many. Now I think in this Caſe much may be argued from the Names and Appellations of the Children of the Royal Family.

Queen, its Etymology.

Her Prerogatives.

Princes and Princeſſes, how called in Hiſtory,

In Hiſtory they are called the Children of *England*, and all of them born Princes and Princeſſes of *England*, before they had any Title, and all of them Kings and Queens *in potentia*, and may one Day Reign over us. *Selden* calls them Heirs apparent of *England*, and they are called ſo in the Parliament Rolls. This agrees with the moſt early Times in our Kingdom, for till *H.* the Firſt's Time they were diſtinguiſhed from all other Perſons, by calling both the Eldeſt,

and Parliament Rolls.

and the reſt of the King's Sons *Clito* and *Clitones*, and they had no other Titles. Now *Clito* is a *Latin* Word which comes from the *Greek* Word Κλειτος which ſignifies *Inclytus*, moſt Noble and Famous; ſo the Word *Ætheling*, as *Edgar Ætheling*, who was not the King's Son, but his Great Nephew, from the *Saxon* Word Æðel, *Ethel*, *nobilis*, which ſhews that all the Royal Family were called by the ſame Name as the King's Sons, and ſo ſets out the admirable Union of the Royal Family. *Selden's Tit. Hon.* 498, 499.

Etymology of *Clito* and *Ætheling*.

The firſt Son of the King is called Prince of *England*, before any Creation. And ſo it is in *Scotland*; before the Union he was called Prince of *Scotland*. And ſo ſays Mr. *Selden* it is in other Nations; as in *France*, the Duke of *Orleans* Regent of *France*, was called *Petit Fitz de France*, Grandſon of *France*, not Grandſon to the King; ſo *Henrietta Maria* in the Marriage Articles with *Charles* the Firſt, was called *Fille de France*, Daughter of *France* and not Daughter of the King. *Rymer* 17 *Tom. p.* 674. *Selden's Titles of Honour* 493, *&c.*

Prince of *England*.

Having then made it appear, I think clearly, that all the Children and Grandchildren of the Royal Family, are publick Perſons, and Princes of the Nation, and the Prince of *Wales* himſelf one and the ſame Perſon with the King, it follows manifeſtly, as a juſt Corollary and Conſequence, that the King who has the executive Power in him, is to have the Care and Command in the Marriages of theſe Children, for the Good of the whole Nation; it is Part of that original Truſt which by the Conſtitution of our Government is repoſed in the King, for the Security of his People.

And as this is a Prerogative veſted in the Crown, in the Reaſon of the Law, and Nature of a Monarchy; ſo in all Ages the Crown has practiſed, and been in poſſeſſion of this Right.

The Crown has always poſſeſſed the Right in Queſtion.

Now in the Point of Marriages there are Precedents from the Time of *H.* 3. down to this Time.

Duke of *Suffolk*'s Caſe, *Temp. H.* 6.

In 28 *H.* 6. it was one of the Articles of Impeachment of High Treaſon againſt the Duke of *Suffolk*, for attempting only to marry his Son to *Margaret* the Daughter and Heir of the Duke of *Somerſet*, who had a Right to the Crown, after the Death of the King without Iſſue, altho' ſhe was not Heir apparent, for there was a Prince of *Wales* then living. *Cotton* 642, 643.

When he came to his Trial he did not deny but it was an Offence, but inſiſted it was not true, for that ſome of the Lords then preſent knew, that he intended to marry his Son to the Earl of *Warwick*'s Daughter.

And this is ſtill the ſtronger, becauſe this Lady was in Ward to him, and ſo he had a private Right in her Marriage.

Stat. 28 *H.* 8. made it Treaſon to marry Royal Iſſue, without Leave.

By an Act of Parliament of 28 *H.* 8. it is made High Treaſon to marry any of the Royal Family; it is thereby enacted, That if any Perſon preſume to marry any one of the King's Children lawfully born, or otherwiſe, or commonly reputed or taken for his Children or Grandchildren, without the ſpecial Leave of the King, ſhall be adjudged a Traitor to the King and the Realm; and thereby it is made High Treaſon in the Lady too, being againſt the King and Realm; which ſhews plainly, the whole Kingdom is concerned.

(Tho' repealed) Inference from it.

And tho' this Act is now repealed in a Crowd with other Acts, to bring all Treaſons to the Standard of 25 *Edw.* 3. yet it is impoſſible the Parliament ſhould make that High Treaſon that was no Crime at all before, and eſpecially High Treaſon in his own Children, nay when it was lawful before to marry any Perſon of the Royal Family, (if the Doctrine we are taught be true) and each had a private Right to marry as they pleaſed; and it is obſervable here, the Parliament makes no difference whether the Father be living or not, nor takes any Care of that paternal Right which is pretended.

In Queen *Mary*'s Time, tho' this Offence ceaſed to be High Treaſon, yet it did not ceaſe to be a Crime; for in the Year 1558 the King of *Sweden* ſent a Meſſage ſecretly to the Lady *Elizabeth*, the Queen's half Siſter only, afterwards Queen *Elizabeth*, who was then at *Hatfield*, to propoſe Marriage to her, but ſhe rejected it with Warmth, for this Reaſon, becauſe the Propoſal came not to her, by the Queen's Direction; and upon an Excuſe made by the King of *Sweden*, that he firſt made Love as a Gentleman of Quality to gain her Conſent, and then he would, as a King, addreſs himſelf to the Queen in proper Form; her Anſwer was, ſhe was to entertain no ſuch Propoſitions, unleſs the Queen ſent them to her. Upon this the Queen ſent Sir *Thomas Pope* to the Lady *Elizabeth*, to let her know ſhe well approved of the Anſwer ſhe had made; and the Lady *Elizabeth* further declared, ſhe would never ſee the Meſſenger more, becauſe he had preſumed to come to her without the Queen's Leave. *Burnet's Hiſtory of the Reformation, Vol.* 2. 361.

Princeſs *Elizabeth, Temp. Mar.*

So that here is one Foreign King and two Queens of *England* concurring in the ſame Sentiment, which ſeems ſtrongly to argue it is the Law of Nations as well as the Prerogative of this Crown.

The next Inſtance I ſhall mention, is the Caſe of Lady *Arabella*, and a Law Book to ſupport it, and that is the Counteſs of *Shrewsbury*'s Caſe, 12 *Co.* 94. in the tenth Year of King *James* the Firſt, the Counteſs of *Shrewsbury* was then in Priſon, and ſent for before the Council to anſwer to a Contempt of dangerous Conſequence, becauſe ſhe refuſed to anſwer, when examined about Lady *Arabella*'s Flight, for marrying Mr. *Seymour*, ſhe being of the Royal Family; and there the Attorney and Solicitor General of the King charge it as a Crime, that Lady *Arabella* being of the Blood Royal, had married Mr. *Seymour*, ſecond Son of the Earl of *Hertford*, without the King's Privity and Conſent; now it appears *Seymour* was committed to the *Tower* for this Offence, but eſcaped, and that Lady *Arabella* was alſo committed, and

Lady *Arabella*'s Caſe, *Temp. Jac.* 1.

and ſhe eſcaped, and was taken flying beyond Sea, before ſhe got over.

The firſt Crime charged upon the Counteſs, was her Abetting the Flight of Lady *Arabella* her Niece, and the immediate Crime was her not anſwering in that Caſe; now, if Marrying without the King's Leave was no Crime, ſhe could never have been accuſed, for not anſwering to her Abetting the Flight for ſuch Marriage; ſo that the Marrying without Leave was plainly charged as a Crime; they both were committed for a Crime, and they both fled as for a Crime, and it is admitted and taken for granted to be a Crime; and her Contempt in not anſwering, in the Caſe of Marriage in the Royal Family, reſolved to be a Crime; and this was done by all the Great Miniſters of State, and by the Chancellor, and two Chief Juſtices, *Fleming* and Lord *Coke*, and Chancellor of the Exchequer and Duchy, and Chief Baron, in the fifteenth Year of King *James* the Firſt, and in the End ſhe was fined 10000 *l.* and committed to the *Tower*.

Duke of *York*, *Temp. Car.* 2.

The next Caſe I ſhall mention is the Marriage of the Princeſs of *Modena* and the Duke of *York*. There was an Addreſs of the Houſe of Commons to the King, to prevent this Marriage; the King's Anſwer is very remarkable; It is compleated, ſays the King, but it was with my Conſent and Authority, and the Parliament acquieſced in that Anſwer.

Now this Addreſs was abſurd, if the King had no Power to prevent it; ſo that this amounts to the Judgment and Opinion of the King and Parliament, that this Right was in the Crown, excluſive of his Brother; ſo here is the King claiming this Authority, even againſt his own Brother, and his private Right, and the Parliament confirming it.

Princeſs of *Orange*.

Then there is the Marriage of the Princeſs *Mary*, Daughter of the Duke of *York*, with the Prince of *Orange*; this Match was made intirely by the King's Conſent, even without the Knowledge of the Duke her Father, and againſt his

Liking and Conſent. The King, ſpeaking to Sir *William Temple* about this Match, ſays, If I am not deceived, the Prince of *Orange* is the honeſteſt Man in the World, and I will truſt him; therefore he ſhall have his Wife, and you ſhall go and tell my Brother ſo, and that it is a Thing I am reſolved on. The Duke was chagrin'd a little, but ſaid the King ſhall be obey'd. See Sir *William Temple's Memoirs.*

Here is a Father acknowledging the Right to be in the King, to marry his own Daughter, who was only a collateral Relation to the King, and married againſt the Father's Will, as every one knows.

In 1683, the Match with the Princeſs *Anne*, the other Daughter of the Duke of *York*, was made by the King, in the ſame Manner. And both theſe Marriages were eſtabliſhed by a publick Declaration of his Majeſty to the whole Nation. Princeſs of *Denmark.*

And thus I beg Leave to conclude the Inſtances of Marriage, but with this Remark, that happy it is for this Nation, that the King in the two laſt Inſtances had this Prerogative; for had this pretended Paternal Right then prevailed, the *Engliſh* Nation had been for ever undone, and our Religion deſtroyed, and we had never ſeen the many and great Bleſſings we enjoy, and are like to enjoy by this Family ſitting on the Throne of *Great Britain.*

Thus the Nation ſees the Trace of this happy Prerogative, from *Henry* the Third's Time to this very Day, being the Compaſs of almoſt 500 Years, uninterrupted, undiſputed, and not one ſingle Inſtance to the contrary.

Theſe Inſtances concerning Marriages of the Royal Family being ſo numerous, and the Light ſo glaring, from Hiſtories, Records, publick Acts, Statutes, and Law Books, the two Judges who differ, could not reſiſt this Part of the Queſtion; but have retired to the other Part, that of the Education, tho' I hope to prove that if the King has the Marriage, he muſt have the Education too.

Reaſons why the King ſhall have the Education of his Grandchildren.

The Reaſon that my Lord *Coke* gives, why the Queen Dowager cannot marry without the King's Leave is, *Ne capitalibus inimicis Regis maritentur.* Now the Reaſon for the King's having the Wardſhip of his Grandchildren, and Education too, is ſtronger, *viz.* leſt the Heir of the Crown himſelf be led aſide by ill Principles, and bad Politicks, and become himſelf an Enemy to the Conſtitution, and to the Kingdom; Marriage is one of the main Ends of the Education, and that Education is a principal Qualification for that Marriage, and therefore can never be ſo properly placed as with him who has the Marriage. *Vide* 6 *H.* 6. 2 *Inſt. p.* 18.

Beſides, theſe two Powers, if placed in different Perſons, may claſh, and be repugnant, for which of them is to determine when the Marriage is to begin, and to whom, and when the Education is to end.

Again, if the King has the Marriage, he has the Appointment of the Time of that Marriage, and conſequently he can at any Time appoint it, and he that can at any Time appoint the Marriage, can at any Time call for the Cuſtody of that Perſon, and he that can at any Time demand the Perſon out of Cuſtody of another, has the intire Power over that Perſon.

Again, it is a true and regular Argument, and concluſive to ſay, that whoever has the End, muſt have the Means alſo, otherwiſe he cannot be ſaid to have the End.

If I have the Marriage of any Perſon, I can never be ſure of that, unleſs I have the Cuſtody and Education of that Perſon. But his Majeſty's Prerogative in this Part of the Queſtion relating to the Education, is as clearly to be made out, tho' not by ſo many Inſtances as the Caſe of Marriage.

When Prince *Charles* had by Surprize got Leave of his Father to make a Journey to *Spain*, to fetch Home his Mi-

ſtreſs the *Infanta*, and revolving in his Mind the Hazard of that Expedition and the ill Influence it might have on the People; King *James* then declared that the Prince was looked upon by his People, as the Son of his Kingdom. *Clarendon's Hiſtory p.* 14. and this being related by him, carries with it his Authority too, who was a very great Lawyer and Chancellor of the Realm.

The Law Books of *Bracton* and *Fleta*, which have been quoted, are the antient Law of the Land extending to all Caſes; but this Law being altered only in private Caſes by Uſage and Statute, it remains Law to this Day, as to the Royal Family, becauſe as to them this Law has had no Alteration by any Law or Statute whatever, and the Uſage has gone accordingly.

The Authority of *Bracton* and *Fleta* in what Caſes allowed.

Theſe Law Books are ſo ſtrong that there has been no way thought of to evade them, but by denying the Authority of them, and calling it Civil Law. But I own I am not a little ſurprized that theſe Books ſhould be denied for Law, when in my little Experience I have known them quoted, almoſt in every Argument where Pains have been taken if any Thing could be found in thoſe Books to the Queſtion in Hand, and I have never known them denied for Law, but when ſome Statute or Uſage Time out of Mind has altered them. We have been told indeed that they were quoted in the Caſe of Ship-Money; but I believe that Objection would not have been made, if they had been aware, that theſe very Books were quoted on both Sides the Queſtion; which deſtroys the Objection, and ſhews they were approved off by all who argued in that Caſe, both of one ſide and the other.

But if it be meant Civil Law, becauſe it is in force in all Civilized Nations, I believe that is true, for I take this to be the Prerogative of all Kings, nor has there been any Inſtance given in any Monarchy, where the Law is otherwiſe.

Mr. *Sel-*

The King of *England* is an Emperor.

Mr. *Selden* ſays the King of *England* is an Emperor, and this Realm an Empire; and ſo called in Statutes and Records without Number; and if ſo, he will have this Prerogative equal with other Kings and Emperors, if no Statute Law or Uſage ſays the contrary.

The Law of Nations is Part of the Law of the Land.

If the Prerogative then be the Law of Nations, that is Part of the Law of the Land, and will give the King a clear Title to it.

Argument from the Statute of Precedency.

See the Statute of Precedency which is 32 *H.* 8. *cap.* 10. it enacts, That no Perſon preſume to ſit at any Side of the Cloth of State (except the King's Children); then, when it goes on to place the Great Officers of State, it ſays, That being Barons they ſhall be placed on the left Side of the Parliament Chamber, above all Dukes, except the King's Son, the King's Brother, the King's Uncle, the King's Nephew, *i. e.* his Grandſon, or the King's Brothers or Siſters Son.

Now this ſhews that the King's Son, and the King's Nephew or Grandſon, is comprehended under the Term, King's Children, becauſe the latter is ſubſtituted in the Place of the former.

Prerogative of the King's Children born out of the Realm as to Inheriting.

17 *Edw.* 3. Archbiſhop of *Canterbury* came into Parliament and demanded, *ſi les Enfans notre Sen. le Roy*, born beyond Sea, ſhould inherit in *England* becauſe born out of the King's Dominions and Aliens, and all the Parliament agreed let them be born where they would, they ſhould inherit. *Cotton* 38. It would be a Jeſt to imagine that the King's Grandchild was not within that Law, and within the Words *les Enfans* Children, and there is the ſame Reaſon in this Caſe.

Precedency of a Grandchild before thoſe more remote in Succeſſion.

Another Reaſon is that the King's Grandſon is higher in Dignity, becauſe nearer the Crown, than any other of the King's Sons, except his own Father, therefore ought to be eſteemed equal with his own Sons; and therefore if Prince *Frederick* were here, and the King had other Sons beſides the

Prince, he would take Place of all thoſe, as *Richard* of *Burdeaux* did, when his Grandfather placed him at a publick Table, above all his own Children who were his Uncles. *Speed* 723.

Grandchildren of the Crown ſtiled Children.

Purſuant to this Notion, Grandchildren of the Crown, are ſtiled Children in Records.

Rich. 2. *Temp. Ed.* 3.

There is 50 *Edw.* 3. *Richard* Prince of *Wales*, his Writ of Summons to Parliament is directed thus, *Rex Edwardus chariſſimo Filio meo Ricardo Principi Walliæ.* Cotton 143.

So is 51 *Edw.* 3. This Prince *Richard* holds a Parliament, by Commiſſion from his Grandfather, and that runs in the ſame Manner, *de Circumſpectione & Induſtriæ magnitudine Chariſſimi Filii noſtri Ric'i Principis Walliæ.* Pat. Rol. 51 Edw. 3. m. 41.

Education more than Marriage.

Now, I think Education is of greater Conſequence than Marriage, both to the Perſon, and to the People of *England.* To the Perſon, becauſe if he be bred either in the Popiſh Religion, or is trained up in any other Communion, tho' Proteſtant, except the Church of *England*, he is not capable of Reigning, and if bred up in Arbitrary Principles, inconſiſtent with a limited Monarchy, the whole Nation will then be in Danger; whereas an ill choſen Match will only be the moſt uneaſy to the Prince that marries, and will little affect the State ſo long as the Prince is ſteady, and adheres to the Conſtitution.

Where is a Prince to be Educated, who is to be bred up a King, but in the Palace and Court of a King, and under his ſpecial Care and Influence?

Sir *John Forteſcue* Lord Chancellor *Temp. H.* 6. his Opinion.

The learned Sir *John Forteſcue*, called by Sir *Walter Rawleigh* the Bulwark of the Law of *England*, who was Chief Juſtice and Chancellor, and alſo Tutor to the Prince of *Wales* in *H.* 6th's Time, in his Treatiſe *De Laudibus Legum Angliæ*, which conſiſts of Dialogues between him and the Prince about his Education, ſays that there were two Things

that a Prince, who is like to be Heir to the Crown ought principally to be inſtructed in, that is Martial Diſcipline, and the Laws and Conſtitution of *England*, and where are thoſe to be had but in the King's Armies, and among the Great Officers and Miniſters of the King?

The ſame Sir *John Forteſcue* ſays, ſpeaking of the King's Wards in Knights Service, the Princes of the Realm alſo holding of the King, muſt be well educated, ſince theſe Orphans, in their Childhood are brought up in the King's Houſe; therefore I cannot but greatly commend the Riches and Magnificence of the King's Court, becauſe it is the ſupreme School for the Nobility of the Land, whereby the Realm flouriſhes and is preſerved, *ca.* 45. *p.* 107.

Patent *Ed.* 4. There is a Patent in the 13th of *Edw.* 4. from the King to the Biſhop of *Rocheſter*, whereby he was conſtituted Tutor to the Prince, and Preſident of the Prince's Council, which is very remarkable; in the Preamble it ſays, Howbeit every Child in his Youngage ought to be brought up in Virtue and Knowledge; yet nevertheleſs ſuch Perſons as God has called to the pre-eminent State of Princes, and to ſucceed their Progenitors in the State of Regality, ought more ſingularly to be informed and inſtructed in Knowledge and Virtue; We therefore deſiring our deareſt Son the Prince, perfectly, knowingly and virtuouſly to be educated in his Youth, and wholly truſting in the Truth, Wit, Knowledge and Virtue and alſo Love and Affection that our Reverend Father hath to Us and to our Iſſue, We have committed and deputed him to teach and inform our ſaid Son, and alſo appointed him Preſident of his Council, giving him Power to aſſemble all the Counſellors of our ſaid Son.

Now, what I would obſerve from this Patent is, in the firſt Place, that it ſhews the great Regard that is to be had to all the Prince's or King's Children, all who are like to ſucceed to the Crown, that they above all others ought moſt ſingularly to be educated, and makes no Diſtinction in the Education between the firſt or any other of the Princes of the

the Royal Blood, and the Education to be perfect in Knowledge and Virtue.

In the next Place it ſhews the Qualifications of ſuch Tutors, and who is to chooſe them.

This does not invade the paternal Right, but is conſiſtent with it; it is very poſſible that a Grandſon may obey both Father and Grandfather, nor can it be ſuppoſed that the Father and Grandfather will give contradictory Commands without Breach of Duty in the Son; but it ought to be preſumed by all reaſonable Men that they will both concur in material Parts of the Education, both for the Good of their Child and for the Safety of the Kingdom; ſo that in this concurs the Law of God as well as Man; for I believe Nobody never yet doubted but a Grandſon was within the fifth Commandment, and in Obedience to that Law, the Patriarchs always conformed themſelves. But theſe Sticklers for paternal Right ſeem to have forgot the Right of the Mother, which by the fifth Commandment, is as well eſtabliſhed as the Right of the Father, and ſome Civilians give a Superiority to the Mother, at leaſt by the Law of Nature; and I believe that Nobody ever thought that giving this Power to the Father excluded the Right of the Mother, nor can the Suppoſition that the Mother ſhould contradict the Command of the Father any more deſtroy the Superiority of the Husband in the one Caſe, than the ſame groundleſs Suppoſition in the Son, deſtroy the Right of the Father in the other Caſe.

Conſtruction of the fifth Commandment.

But to ſuppoſe for once an unreaſonable Thing, and what will never happen, that there ſhould be contradictory Commands, the publick Good muſt be preferr'd, and Duty to Parents muſt be always ſubject to the Safety of the whole Community, and the King who is *Parens Patriæ*, as well as *Parens Nepotis*, muſt be obeyed, to whom there is a double Obligation, by Nature and by Allegiance, *i. e.* by the Law of God and Law of Man.

Publick good to be preferred.

As

The Prince not within *Stat.* 12 *Car.* 2. 24.

As to what was ſaid by Brother *Reynolds*, the Prince's Counſel, in Relation to the Statute of 12 *Car.* 2. *cap.* 24. that the Prince was within that Act of Parliament, I deny it to be Law, or any thing like it; for then it would be in the Power of the Prince to grant or appoint by Deed or Will the Guardianſhip, Cuſtody or Tuition of his Son, to the King of *France*, the *Turk*, or any Perſon whatever; which would be in Effect to give him a Power of diſpoſing of the Crown; and by this learned Doctrine, the Royal Family might be diſperſed all over *Europe*, and this Nominee would be intitled to take the Profits of all the Lands of ſuch Heir to the Crown, and the Management of all his Eſtate.

Richard 2.

What was ſaid by my Brother *Eyre*, as to the Black Prince's Diſpoſing of his Son's Governance, that was a Caſe of abſolute Neceſſity and in the Abſence of the King in Foreign Parts, for he was then on his Journey to the *Holy Land*. Vide *Acta Regia*.

Opinion for the King.

Montague Baron: I do not know that I ever was or could be of any other Opinion than for the King in this Caſe; what gave me the firſt Impreſſion was the Government and Diſcipline among the Patriarchs, who educated and governed all the Grandchildren and Great Grandchildren under them.

In the Patent for the ſole making of Cards, the King is called *Parens Patriæ, & Cuſtos Regni, & Pater Familias totius Regni.*

Bracton and *Fleta* good Authorities.

I inſiſt on *Bracton* and *Fleta* being good Authorities. It is objected indeed this is Civil Law; that may be, and yet it may be and is the Law of the Land alſo, and theſe Books take Notice of ſeveral Things that are Law now, beſides this Caſe; theſe Books are often quoted by the greateſt Judges and Lawyers heretofore in *England*, and allowed as Law. The Lord Chief Juſtice *Holt* in the Caſe of *Coggs* and *Bernard*, *Trin.* 2 *Anne*, which was (a very fine Caſe) in the King's Bench, grounded himſelf on *Bracton* in giving

the Opinion of the Court. There is too but one Family, and the Prayers of the Church are formed accordingly; and it would make great Confuſion if the Prince of *Wales* ſhould differ from his Majeſty. On great Reaſon then, is this Prerogative founded; becauſe the Royal Family ſhould not be of any other Religion whatſoever than that of the Church of *England*, and not only that they ſhould not be Papiſts. If you ſecure the Crown, the King muſt have the Education, and ſo the Children of the Crown will be bred up accordingly; and Children do include Grandchildren no doubt; now the Law of Purveyance was for all the Royal Family, not confined to Children but extends to Grandchildren.

Children of the Crown includes Grandchildren.

As to the Caſe of *Edw.* 5. there may be ſome Satyr in it, but no Argument, ſo as to bind us to take Notice of what was ſaid only in the Sanctuary by the Queen. And as to what was ſaid about the Governance of *Richard*, Son of the Black Prince, he was Abroad then, as has been obſerved.

Duke of *York*'s Caſe, *Temp. Ed.* 5.

Pratt Juſtice, afterwards Chief Juſtice of *England*: The Caſe of Marriage in the Royal Family, is an undoubted Prerogative of the Crown, proved by all the Arguments, the Nature of the Thing is capable of; conſtantly claimed, always enjoyed, and conſtantly ſubmitted to; and when done and acted contrary, it was always taken to be a great Offence, and ſome time thought High Treaſon. And that the Crown has been in poſſeſſion of this Prerogative, appears by the many Inſtances out of *Rymer*, where it appears the Crown granted Proxies for that Purpoſe very often.

Opinion for the King.

The Counteſs of *Shrewsbury*'s Caſe in 12 *Co. Rep. p.* 94. is ſtrong, tho' it did not proceed to Judgment, not pretended to be ſaid, nor was it ſaid to be no Offence. The Caſe of the Duke of *Suffolk*'s Attempt only, was thought to be High Treaſon; from thence it may be infer'd it was a very great Offence. Then there is the Opinion of the Parliament in 28 *H.* 8. 18. and no Inſtance is or can be given to the contrary. The Caſe of the Princeſs of *Orange* is very material; the King made the Match, and the Duke of *York*, her Father, was againſt it. But it was ſaid the Princeſs

The Caſes of Marriage briefly conſidered.

of *Modena* deſired the King to prevent it, but what was the King's Anſwer? his Anſwer was, it is too late, it was by my Conſent; here is the Claim of Prerogative, againſt the Opinion and Conſent of the Father. So much as to the Point of Marriage.

Education.

A Conſequence of the Right over their Marriage.

Now as to the Education of the Children and Grandchildren of the Royal Family, that is a natural and neceſſary Conſequence, that if the Crown has the Marriage of the Royal Family, it hath the Care of their Education; if not educated well, they cannot be married well; the King having the End ſhould have the Means; he ſhould take Care of their Perſons, that they ſhould not be diſpoſed of to the Prejudice of the Nation, for it cannot be undone afterwards. I do not ſee any Anſwer given to that Caſe in *Ruſhworth*, about the Infanta of *Spain*, the Son might in fact have contracted as well as the Father, tho' perhaps wrong, yet he does not any way contradict the Power of his Father. And this carries Authority of Parliament with it. I am of Opinion this Prerogative was never diſputed by any of the Royal Family, and many have been proſecuted for the Breach of it; and indeed we never can have any Inſtances in this Affair, but when there is Diſcord in the Royal Family, great Inconveniencies attend the contrary. How great Diſtractions and Confuſions attended the Differences between the Houſes of *York* and *Lancaſter*, when one of the Family was at Home, and the other Abroad.

Opinion for the Prince.

Eyre Juſtice, and the Prince of *Wales*'s Chancellor: I am of a contrary Opinion to my Brothers, that ſpoke laſt; the Queſtion is, Whether the King has a legal Right to diſpoſe of the Marriage and Education of his Grandchildren, excluſive of the Father? The Inconveniencies are above me to expatiate upon; but if any Thing be amiſs, the Legiſlature will ſet it right. No Authority has been produced out of any of our Law Books, no Guardianſhip by the Prerogative has yet been proved; the Lord Chief Juſtice *Coke* ſays nothing of this Prerogative, he would tell us ſurely when theſe Prerogatives began, and where they ended. As to

Bracton

Bracton and *Fleta*, what is quoted out of them is not Law, nor accounted ſo. There is no ſuch Term in our Law, as *emancipatio* or *foriſfamiliatio*; Dr. *Cowell* reſtrains it to the Father's dying. *Cowell's Inſt. tit.* 9. Grandchildren may be Children, but that argues nothing as to Wardſhip; but whether the Practice in the Crown, as to this Prerogative, be otherwiſe is the Queſtion. It doth not appear in any of theſe Cuſtodies, whether it was in the Life of the Father or not, and there is Reaſon to think it muſt be by reaſon of ſome Tenure. As to the Caſe of the Duke of *Glouceſter*, that does not appear to us, but it was by Conſent; a Motion was made in Parliament, to remove him from his Preceptor, and it paſſed in the Negative. To be ſure the Publick has an Intereſt in all the King's Children, the Parliament ſometimes interpoſes in the Caſe of proclaiming Peace and War, and yet the King has that Right; ſo the King has interpoſed in theſe Caſes, but it cannot be infer'd from thence it is a Right. And give me Leave to ſay the Crown has not always been in Poſſeſſion of this Prerogative; for *Edward* the Black Prince came over and returned to *Berkhamſtead* till the Death of the Grandfather, *Hollingſhead*, and it is material that he had the Governance and Education of his Son *Richard*. In the Caſe of *Edw.* 5. it was not pretended, nor thought of, that the King had this Right; the Queen's inſiſting, and being in Poſſeſſion is an Inſtance againſt the Uſage, they did not inſiſt on any Law to take the Duke of *York* out of her Hands. The Prince is the Guardian to his Son by Nature and by Law, and no Law Book makes any other Diſtinction; Inconveniencies are not what is left to my Conſideration, and the Uſage is on our ſide the Queſtion.

Denies the Authority of *Bracton* and *Fleta*.

The Publick has an Intereſt in the King's Children.

The Black Prince and his Son.

Edw. 5.

As to Marriages of the Royal Family they are of a publick Conſideration; Alliances and Treaties depend upon them, the Crown has always interpoſed in theſe; ſo in private Families the Grandfather has interpoſed ſometimes.

Marriage.

As to the Caſe of the Duke of *York*'s Children, tho' thoſe Marriages might be without the actual Agreement of the Duke, yet it does not appear that it was againſt his Conſent, ſo is no Inſtance at all; and indeed there is no Inſtance

The Precedents conſidered.

Inſtance appears that they have been diſpoſed of againſt the Conſent of the Father.

As to that Caſe of the Duke of *Suffolk*'s being impeached of High Treaſon, can any one ſay it was High Treaſon? In the Caſe of Lady *Arabella*, there was no ſuch Declaration there, it was a Contempt indeed, but not ſaid ſo by the Judges; there may be Inſtances of High Treaſon concerning thoſe Marriages in former Ages, but there is no Law Caſe, or Law Book, or Statute, that now declares the King has this Prerogative, therefore I cannot be convinced that the King has any legal Right to it.

Opinion for the King.

Dormer Juſtice: I am of a contrary Opinion to my Brother *Eyre*, and that the King has a legal Right to this Prerogative; the King is *Pater Patriæ*, and his Grandchildren are the Children of the Kingdom, and of the Publick. And I think the King that has the Marriage has the Care of Education alſo; the Duke of *Norfolk* at his Trial confeſſed it was a great Contempt in him, to attempt to marry the Queen of *Scots*. So in the Caſe of the King of *Sweden*, Queen *Elizabeth* would not hear of it, nor ſee the Perſon who was to propoſe the Match to her, without the Queen's Leave tho' *jui Juris*, yet the Father has not the Diſpoſition of his eldeſt Son in the Caſe of the Royal Family; in the Caſe of the Duke of *Glouceſter* this Right was taken for granted. As to the Caſe of *Edward* 5. what the Queen ſaid there in the Sanctuary, that argues nothing, and ſhe did deliver him up at laſt. 'Tis ſaid here is no particular Caſe: If no particular Law Book in the Caſe, yet there are many notorious Facts, Records and Inſtances out of *Ruſhworth* and other Books, which amount to Uſage with ſuch a Conſtancy, as makes it Law and gives this Prerogative to the King.

Duke of *Norfolk* and Queen of *Scots* and other Inſtances conſidered.

Opinion for the Prince.

Price Baron: This is a Caſe of great Conſequence, ſo that I am in great Perplexity, not that I am afraid to give my Opinion, but I cannot come into the Opinion which moſt of my Brothers have given. The Queſtion is, Whether the King has this Prerogative, excluſive of the Prince

his Son? The Father hath the Guardianſhip againſt the Grandfather. So is *Roll's Abridgment*, and 30 *Edw.* 3. and *Littleton, ſect.* 114. Preſcription to the Marriage of the Tenant's Son againſt the Father, was againſt the Law of Nature. *Vaughan's Reports* on 12 *Car.* 2. is ſtrong, the Father is Guardian by Nature, *Dyer* 190. againſt any Law whatſoever; between Subject and Subject it is very plain and clear the Prince is a Subject, and the Prince held by Tenure at firſt and that Tenure is taken away by the Act of 12 *Car.* 2. but this they ſay does not bind the King's Prerogative, and why ſo? the Court of Wards and Liveries were once his Prerogative, but not ſo now. I wiſh there is nothing in the Belly of this Queſtion, to get ſomething after it, they muſt have diſtinct Settlements, if you ſet the Grandſon above the Father, Dependance creates Duty. It was an Article of Impeachment, to endeavour to introduce the Civil Law. *Bracton* and *Fleta* are old Civil Law Books, they may fetch out of theſe Books, Ship Money, and diſpenſing Power, they were all fetched out of theſe old Books. As to *Rymer* he is anſwered by this, either the King had the Right of Wardſhip in thoſe Caſes, or he interpoſed out of Care to the Royal Family. The Nobility themſelves did ſometimes maintain and portion their Relations Abroad; to call all Bounties, Rights, is very hard. As to the Caſe of *H.* 6. not to marry a Queen, without the King's Conſent, they would not make that Law if they had a Law before. *Owen Tudor* married the Widow of *H.* 6. that was the Reaſon of that Law, and when repealed that ſhewed it to be unreaſonable. Nobody can ſhew any legal Proſecution for theſe Things. As to the Articles of Marriage of *Car.* 1. I can hardly think the King would make ſuch an Oath, I have ſuch an Opinion of his Piety; for thoſe Articles are void, and it is no Wonder that Kings will not treat but with Kings. That Caſe of the Princeſs of *Orange* was with Conſent, there being an Agreement between the two Brothers. That of the Duke of *Glouceſter* was alſo by Agreement, for who would deny the King? All theſe are no more than Conceſſions or Agreements. We have a Legiſlature which will interpoſe if there be any Miſmanagement in the Prince. I will ſuppoſe for

Reaſon to deny the Authority of the old Books.

Precedents conſidered.

once, the Prince could be a Papiſt or an Atheiſt, the Parliament would interpoſe in ſuch a Caſe; 'tis with great Anxiety I ſpeak in this Caſe.

Opinion for the King.

Precedents conſidered.

Tracy Juſtice: I differ from my Brother that ſpoke laſt. This Power is Part of the Original Truſt repoſed in the King. We owe the Bleſſings of this Government to a Marriage made againſt the Conſent of the Father. Here are all Sorts of Proofs from *Henry* the Third's Time to this very Time, of Marriages in the Royal Family, the Expreſſions are not only *laborabimus*, but *dabimus & conceſſimus*. The Caſe of the Princeſs of *Orange* is a ſtrong Caſe, the King made that Match by his own Authority, no Notice taken of the Father, who was forced to ſubmit to it. So that of Queen *Elizabeth* is very ſtrong when *ſui Juris*, no need to compliment in ſuch Caſe. That Caſe of Lady *Arabella* is very material, ſhe was committed to the *Tower* and charged with this Crime, and ran away, and eſcaped with Hazard from this Crime; if it were not Criminal there could not be all that ſolemn Examination by two Chief Juſtices and a Chief Baron and other Miniſters of State. The Parliament alſo has affirmed this Power, the Statute 28 *H.* 8. is a ſtrong Argument that the Parliament thought it to be unlawful, when it was once made High Treaſon. That Addreſs in the Duke of *York*'s Caſe to ſtop the Marriage with the Princeſs of *Modena* is very material; and in ſhort I think this Power in the Crown has been proved very well. And this I would obſerve does not exclude the Father's Advice and Counſel; now if this be ſo in the Caſe of Marriages in the Royal Family, it is a great Argument it is ſo as to Education; ſuppoſe the Duke of *York* had brought up thoſe two Princeſſes Papiſts, we ſhould have been all undone, and loſt our Religion; nothing can be of greater Concern than the Care of Education; to be deprived of Education is of much more Conſequence than Marriage; the Law muſt then of Neceſſity be the ſame in both. We cannot expect like Inſtances in Education as in Marriage, becauſe theſe are tranſacted with other Perſons, with Princes, and of the greateſt Quality Abroad, and beyond Sea, and are to be made publick; but Directions about Education

Inference from Marriage to Education.

are of a private Nature, and not likely to be tranſmitted beyond Sea. Of latter Times we have them in *Spaniſh* Matches, as in the Articles of the Prince of *Wales* himſelf. The Caſe of the Duke of *Glouceſter* is directly in Point, and which I rely upon; King *William* named all his Servants by his own Authority, without any Notice to any Body, ſo the ſuppoſed Conſent has no Proof nor Probability. The very Addreſs to the King ſuppoſes he had a Right. I think there are more Inconveniencies in denying this Prerogative, than in any other Prerogative whatſoever, and the Prerogative muſt prevail. The *Stat.* of 12 *Car.* 2. could never intend that any Father had Power to diſpoſe of the Royal Family, they would have prevented ſuch Inconveniencies by this Act if they had imagin'd any ſuch Thing, or that it would be ſo conſtrued. Argument from Inconvenience.

Blencow Juſtice: I am of the ſame Opinion with my Brother that ſpoke laſt, the Precedents are ſo ſtrong, and the Objections ſo weak, that I am clear of Opinion the King has this Prerogative; it is a Prerogative *ſo eſſential* that the Kingdom cannot ſubſiſt without it. Inſtances of Marriage go to full Age, as well as Infants. They have produced no Inſtances on their Side the Queſtion. Marriage is nothing without Education. It is a dreadful Thing to ſeparate the Intereſt of the King and Prince. Children of the Crown are the greateſt Strength of the Nation, greater than the Shipping or Militia, it is of infinite Conſequence, and the Nation cannot ſubſiſt without it; and we are to adviſe the King according to Law. Opinion for the King.

Powis Juſtice: I am of the ſame Opinion this Prerogative clearly belongs to the Kings of *England*; this being of ſuch infinite Conſequence, it would deſtroy us all if it were otherwiſe. We always conſider Inconveniencies in all Matters of Law. And in other Nations it is ſaid, *Salus Populi eſt ſuprema Lex.* To give the Children of the King Education and to breed them up for Kings is a neceſſary Prerogative, and particularly, to ſee them brought up in the Proteſtant Religion, and to reform their Morals, and to learn the Conſtitution, and how to Govern. The King is the fitteſt Opinion for the King.

fitteſt and only Perſon to breed them up with the Love of their King and Country, and he is the Head of the Family, and he is moſt able to do it, becauſe he is aſſiſted with the Pockets of his Subjects. As to Marriages, *Rymer* is full, and to ſay they were by Agreement is an odd Argument, for this is an Anſwer to every Right and Prerogative of the Crown. There are no Facts or Inſtances on the other Side, bu all on this Side the Queſtion, but they would have them all to be by Accident or Agreement. The main Objection is, there are no Book Caſes; that is impoſſible as has been mentioned; as to this peculiar Prerogative, how could ſuch an Affair come into *Weſtminſter-Hall*? Counteſs of *Shrewsbury*'s Caſe is a great Authority, and ſhe was fined 10000*l.* Afterwards was the Marriage of the Duke of *York* to the Ducheſs of *Modena*, and the Princeſs of *Orange*'s Caſe, which are very ſtrong. As to Education, that is a Conſequence of Marriage, *a fortiori* becauſe Education is of greater Concern than Marriage; for, the Education concerns the Publick much more, the other private Life only. Now the principal Articles in that Match of *Charles* the Firſt, was the Education of thoſe Children, and by ſecuring the Education, they ſecured our Religion from Popery, in the Opinion of both Courts. The Caſe of the Duke of *Glouceſter* runs throughout as an Authority, and the Governor or Preceptor ſubmitted to it after a Conteſt.

Authorities conſidered briefly.

Education more than Marriage.

If the contrary were true, this would be a monſtrous Inconvenience, for then the Father might deviſe away the Heir to the Crown, and they might bring him up as they pleaſe, a *Mahometan*, or what not; and this Deviſe could not be altered until the Heir came of Age. *Vaughan* 180. That Caſe of *Edw.* 5. was only about the Sanctuary, that was the Conteſt there and nothing more.

Argument from Inconvenience.

Bury Chief Baron: As to Marriages that Prerogative in the Crown is very clear, the Crown has had it in all Ages, and claimed it as their Right, that of *dabimus & conceſſimus* in *Rymer*, is very ſtrong; in all Times it has been accounted a Crime to marry any of the Royal Family without Leave from the Crown; and all that have had a Hand in ſuch

Opinion for the King.

As to Marriages.

Marriages have been accounted Criminal. As to Education, ſo many Inſtances cannot be expected, becauſe it has ſeldom happened that there are Grandchildren in the Royal Family. The Caſe of the Duke of *York*'s Children is ſtrong; the King claimed it as a Right, and made the Contract, and the Duke gave it up. As to the Authority of the Houſe of Commons, they did not interpoſe as a Legiſlature, and that affirmed the Power of the Crown. Tho' there be a Law to the Contrary, yet the Parliament may interpoſe. I own I did not think that ſo many Precedents could be found, as are here produced both as to Marriage and Education too.

As to Education.

King Chief Juſtice, afterwards Lord Chancellor: The Queſtion is, Whether the Care and Approbation of Marriages in the Royal Family, excluſive of the Father, belong to the Crown? That Queſtion doth not touch the Paternal Right, to be ſure, but the Queſtion is, Whether ſuch Marriage can be without the Conſent of the Crown? and that is plain it cannot. As to Marriages in fact in the Royal Family, Nobody can Inſtance any to be made theſe 500 Years without the Crown's Conſent; the Crown in fact has done it, and where the Crown has not been conſulted, it has been conſidered as a Crime. The Caſe of Lord *Brandon* in *H.* 8.'s Time, and the Caſe of Lady *Arabella* are ſtrong Precedents. It was taken for granted that it was a Crime and Contempt in the laſt Caſe; if this had been no Crime, the Counteſs of *Shrewsbury* could not have been guilty of any Crime whatever. The Houſe of Commons Addreſs in 1673. was ridiculous, if the King had no Power. As to Education, ſo many Inſtances of Marriage is a good Argument for Education too. But it is objected this invades the Right of the Father; not at all ſo, nor is this againſt the Law of God in any Senſe, for Duty to Parents is ſtill ſubject to the publick Good, and there is a Duty ſtill to the Mother as well as to the Father.

Opinion for the Crown. Marriages.

Precedents conſidered.

In the next Place, this is not a Guardianſhip by Tenure, ſo is not within 12 *Car.* 2. And if there be a Guardianſhip by Prerogative, as this is, it could not be within that Statute;

Diſtinction between Guardianſhip by Tenure and by Prerogative.

Statute; which ſhews, that this could not come in Queſtion in *Weſtminſter-Hall* or our Law Books; we can learn it no otherwiſe than by Facts or Uſage. You could have no Inſtance but from *Edward* the Black Prince to *Charles* the Firſt's Time, you could have none in all theſe Reigns. As to that Caſe of *Edw.* 5. that is only of a Queen who claimed it in the Sanctuary, but it does not follow that it was Law. *Ruſhworth* in all the Addreſſes about the Palatinate, mentions the Children of the Palatinate. It is reaſonable to ſuppoſe the King did take Care of the Education of the Princeſſes of *Orange* and *Denmark*. By Order of Council, the King declares he had concluded that Marriage, and that ſhews it was done by the King's Authority. In that of the Duke of *Glouceſter*, every Body knows the King appointed him his Tutor. The Addreſs of the Houſe of Commons was to remove him; why ſhould the King remove him if he had no Power over him? So that I am clear the King has this Prerogative.

Precedents conſidered.

Lord *Parker* Chief Juſtice of *England*, and afterwards Lord Chancellor of *Great Britain*: I am of the ſame Opinion with my Lord Chief Juſtice *King*. The firſt Queſtion is, The Care and Approbation of Marriages in the Royal Family; in private Families, if a Daughter grows up and is marriageable, there is no Law againſt the Daughter's marrying againſt the Father's Conſent; but if againſt the King's Conſent, and ſhe is one of the Royal Family, that is againſt Law expreſly. The fifth Commandment requires Obedience from the Grandſon, as well as from the Son. If the Grandfather command the Son any Thing, the Son ought to comply, elſe it is Diſobedience, and in the King only to command. Then as to the Education of the Royal Family, that is in the King only as his peculiar Prerogative. The Marriage Articles of *Car.* 1. is a very ſtrong Caſe, and ſtronger than I could expect to find it. There being no Grandchildren ſince *Edward* the Third's Time, ſo many Inſtances cannot be produced, nor can this happen, but where there is a Diſagreement in the Royal Family; in this Caſe of *Car.* 1. it is not only an Agreement, but a ſolemn Treaty upon Oath, and many Years a doing. The King

Opinion for the King.

Marriage.

Fifth Commandment.

Education.

Precedents conſidered.

did not need to enter into a Treaty, if the Prince had it in his own Power intirely; but he ſays conditionally, if this devolves to me, then I will alter it. The Contract was not of ſo much Uſe if the Grandfather lived, but if he died it would devolve to him, and then he would alter and enlarge it. And whether this Contract was well or ill made, is not the Queſtion, and nothing to the Purpoſe; there was a Power to make this Contract in the King, nor is it a Queſtion, whether an ill Uſe be made of the Power or not; but the Prince has almoſt in expreſs Words ſaid, he has not that Power; the Power is not in the Prince till it devolves to him as King. And this was on a very ſolemn Occaſion. It is never to be ſuppoſed the King will make an ill Uſe of any Power he has by Law, nor is it to be preſumed the King will do wrong, becauſe all Power is committed to him by Law. You may ſuppoſe any Subject, tho' never ſo great, to be in the wrong, but not the King; no Man that talks like a Lawyer can ſay otherwiſe, and therefore I think clearly this is the King's Prerogative.

The King is not to be preſumed to do Wrong.

Concluſion for the Prerogative.

Both theſe Opinions were afterwards drawn up in ſhort by the Ten Judges, for the Prerogative, and alſo in ſhort by the two Judges, that differed in Opinion from the Ten, againſt the Prerogative, and were delivered ſeverally under their Hands to the Lord Chancellor to deliver to the King. That of the Ten Judges is as follows.

The Opinions were drawn up.

To the King's moſt Excellent Majeſty.

May it pleaſe your Majeſty,

IN humble Obedience to your Majeſty's Commands ſignified to us by the Right Honourable the Lord Chancellor, requiring the Opinion of all your Majeſty's Judges upon the following Queſtion, *viz.*

Of Ten Judges for the Prerogative.

" Whether the Education and the Care of the Perſons of " his Majeſty's Grandchildren, now in *England*, and of Prince " *Frederick*, eldeſt Son of his Royal Highneſs the Prince of " *Wales*,

" *Wales*, when his Majeſty ſhall think fit to cauſe him to " come into *England*, and the ordering the Place of their " Abode, and appointing their Governors and Governeſſes, " and other Inſtructors, Attendants and Servants, and the " Care and Approbation of their Marriages, when grown " up, belongs of Right to his Majeſty, as King of this " Realm, or not ?

We whoſe Names are hereunto ſubſcribed, being Ten of your Majeſty's Judges, together with the other two Judges, having taken the ſame into Conſideration, and after the moſt diligent Search that we could in this Time make into Acts and Proceedings of Parliament, Treaties, publick Inſtruments, and Records, Hiſtories and Law Books, and Conſideration of the Powers and Prerogatives, which from Time to Time in very many Inſtances have been exerciſed, and owned to belong to your Majeſty's Royal Anceſtors and Predeceſſors, with relation to the Marriages and Care of the Perſons of the Branches of the Royal Family, and of the great Concern of the whole Kingdom in ſo important a Truſt, and after having, purſuant to your Majeſty's farther Command, ſignified in like Manner to us, heard a learned Serjeant at Law, who, by Command of his Royal Highneſs, laid before us, ſeveral Things relating to the Queſtion aforeſaid; and after ſeveral Conferences, and Deliberations upon all the Matters aforeſaid, and what occurred to us, and the other Judges thereupon ; we are humbly of Opinion, That the Education and the Care of the Perſons of your Majeſty's Grandchildren now in *England*, and of Prince *Frederick*, eldeſt Son of his Royal Highneſs the Prince of *Wales*, when your Majeſty ſhall think fit to cauſe him to come into *England*, and the ordering the Place of their Abode, and appointing their Governors and Governeſſes, and other Inſtructors, Attendants and Servants, and the Care and Approbation of their Marriages, when grown up, do belong of Right to your Majeſty, as King of this Realm.

All which we moſt humbly ſubmit to your Royal Majeſty's great Wiſdom.

Parker.
P. King.
T. Bury.
L. Powys.
J. Blencoe.
R. Tracy.
Robert Dormer.
J. Pratt.
J. Mountague.
Forteſcue A.

The King communicates it (together with the Opinion of the two diſſenting Judges) to the Privy Council.

This Opinion, together with the Opinion of the two other Judges, his Majeſty was pleaſed ſometime after to communicate to his Privy Council, as follows.

At the Court at Kenſington *the 1ſt of* July 1718.

PRESENT

The King's moſt Excellent Majeſty in Council.

HIS Majeſty was this Day pleaſed to communicate to the Lords of his moſt Honourable Privy Council, that his Royal Pleaſure had ſome Time ſince been ſignified to his Judges, by the late Lord Chancellor *Cowper*, that they ſhould give their Opinions upon the Queſtion juſt before mentioned.

And that his Majeſty, having afterwards been informed that ſome of the Counſel of his Royal Highneſs the Prince of *Wales* expreſſed a Deſire to lay before the Judges ſomething relating to the Queſtion aforeſaid, had further ſignified his

Royal Pleaſure to his Judges, that any one ſingle Perſon, that ſhould apply to the ſaid Judges for that Purpoſe, ſhould be admitted to lay before them what ſuch Perſon ſhould have to offer from his Royal Highneſs. And that the Judges had returned their Anſwer to the ſaid Queſtion, which Anſwer his Majeſty was pleaſed to order to be read this Day in Council, and the ſame was read, whereby it appeared that the ſaid Judges had taken the ſaid Queſtion into Conſideration, and had heard a learned Serjeant at Law, who by Command of his Royal Highneſs had laid before them ſeveral Things relating to the Queſtion aforeſaid; and that ten of the Judges, that is to ſay, *Thomas* Lord *Parker*, now Lord High Chancellor of *Great Britain*, then Lord Chief Juſtice of the Court of King's Bench; Sir *John Pratt*, Knight, now Lord Chief Juſtice of the ſaid Court of King's Bench, then one of the Juſtices of the ſaid Court; Sir *Peter King*, Knight, Lord Chief Juſtice of the Court of Common Pleas; Sir *Thomas Bury*, Knight, Lord Chief Baron of the Court of Exchequer; Sir *Littleton Powys*, Knight, one other of the Juſtices of the Court of King's Bench; Sir *John Blencoe*, Knight, *Robert Tracy* and *Robert Dormer*, Eſquires, Juſtices of the ſaid Court of Common Pleas; Sir *James Mountague*, Knight, one of the Barons of the Court of Exchequer; and Sir *John Forteſcue Aland*, Knight, now one of the Juſtices of the Court of King's Bench, and then one of the Barons of the Court of Exchequer, were of Opinion,

" That the Education and Care of the Perſons of his " Majeſty's Grandchildren now in *England*, and of Prince " *Frederick*, eldeſt Son of his Royal Highneſs the Prince of " *Wales*, when his Majeſty ſhall think fit to cauſe him to " come to *England*, and the Ordering the Place of their " Abode, and Appointing their Governors and Governeſſes " and other Inſtructors, Attendants and Servants, and the " Care and Approbation of their Marriages when grown up, " belong of Right to his Majeſty, as King of this Realm.

The Opinion of the two diſſenting Judges.

And that *Robert Price* Eſq; one of the Barons of the Court of Exchequer, and Sir *Robert Eyre* Knt. then one of the

the Juſtices of the aforeſaid Court of King's Bench, and Chancellor of his Royal Highneſs the Prince of *Wales*, were of Opinion,

" That the Education and Care of the Perſons of his " Majeſty's Grandchildren, the Ordering the Place of their " Abode, and Appointing their Governors and Governeſſes, " and other Inſtructors, Attendants and Servants, belong " to the Prince their Father, but that, the Care and Appro- " bation of their Marriages, when grown up, belong to his " Majeſty as King of this Realm".——Adding, " That in " what concerned the Marriage they deſired to be underſtood " as ſpeaking of a Care and Approbation not excluſive of " the Prince their Father.

For the Prince as to Education, but for the King as to Marriage, not excluding the Prince.

This Sir, is our humble Opinion, but when we acquaint your Majeſty that the Care and Approbation of the Marriages of your Grandchildren belong to your Majeſty as King of this Realm, we deſire to be underſtood as ſpeaking of a Care and Approbation not excluſive of the Prince their Father; but as your Majeſty's Care will be always imployed for the Good of the Royal Family, and the Welfare of your People; ſo it is a Duty incumbent upon every Member of the Royal Family to apply to your Majeſty, and receive your Royal Approbation upon every Occaſion of this Kind. For we find that all Negotiations of Marriages in the Royal Family, have been carried on by the Intervention of the Crown, and ſuch Marriages as have been contracted without the Royal Conſent and Approbation, have been thought Contempts of the Regal Authority; but we find no Inſtance where a Marriage has been treated by the Crown, for any Perſon of the Royal Family, without the Conſent of the Father; and we beg Leave to aſſure your Majeſty, that there is no one Expreſſion in any of our Law Books that warrants any ſuch Aſſertion.

Reaſons offered.

As

As to the other Part of the Queſtion, in Anſwer to which we cannot concur with the other Judges; it is our Duty humbly to lay before your Majeſty, that in our Opinion the Father hath in all Caſes a Right to the Cuſtody and Education of his Children; and this we take to be clear from the general Rule of Law.

Robert Price.
Robert Eyre.

vid. Barrington's Obſervations on the Statutes 2d. Edit. Whoever conſults the Caſe referred to the Judges by George the firſt in Sir Juſtice Fortescues Reports, upon the Queſtion, whether the Grandfather being King, or the Father being only Heir apparent, hath a Right to take Care of the Education of the Royal Children will find that the material Precedents are too few in Number to ſettle that very important Point.

THE

THE

TABLE

OF

The Principal Matters.

Abatement.

PLEA of Alien Enemy, how to be pleaded, when in Abatement of the Writ, and when in Bar. *Page* 221

Action and Action on the Case. See Tit. Arrest.

An Action on the Case, for Goods loſt out of the Ship, will lie either againſt the Maſter or Owners. 35

A good Argument that an Action will not lie, if no Precedent of ſuch an Action being ever brought. 108

Anſwer to the Objection from new Actions on the Caſe. 109

Action on the Caſe will not lie for ſcandalous Words ſpoken in the Houſe of Commons. *ibid.*

Why Action on the Caſe lies for a falſe Return. *ibid.*

Given only out of Neceſſity, becauſe otherwiſe the Party would be without Remedy. 110

If there be an Injury, tho' no Damage, Action will lie at Common Law. 111

But it will not lie for detaining a Legacy, or Breach of Truſt. *ibid.*

No Action at Common Law will lie for a Parliamentary Right; it muſt have a Parliamentary Remedy. *ibid.*

An Action will not lie for *Coſts* by the Name of *Damages*. *Page* 117

There cannot be an Action upon the Caſe, and upon the Statute. 126

Whether Caſe will lie for arreſting without Cauſe of Action. 256

The Anſwer of all the Judges, when demanded by the King, What Remedy was there if a Man bring a falſe Action? 262

Admiralty.

Maſter of a Ship prohibited to ſue the Part-Owners in the Admiralty for Seamens Wages which he had paid. 230

Prohibition denied to a Seaman's Suit in the Admiralty, for Wages upon a Contract with a Freighter, it need not be *ſuper altum mare*. *ibid.*

Advowſon.

Advowſon, what paſſes it. 351

Amendment.

Amendment on paying of Coſts of the *Venire* in a Declaration in Caſe, for negligently keeping his Fire, after Iſſue joined, *&c.* 231

N. B. This Action taken away by Statute 10 *Ann. cap.* 14.

Defendant may plead *De novo.* *Page* 231
Amendment of Information on Statute of Uſury refuſed, becauſe a popular Action. 232
Amendment of Declaration in *Qui tam* in Uſury, after Demurrer allowed, in what Caſes to be refuſed. 277

Annuity.

A Man deviſes an Annuity charged on his real Eſtate to his Siſter and Heir at Law, (who is a *Feme Covert*) and a Portion for her Daughter, and by Codicil ſays, On Condition that they releaſe all Right, *&c.* Debt cannot be maintained for the Arrears of the Annuity incurred during the Coverture, the Siſter being dead and not having releaſed. 188

Appeals.

By a ſtanding Order of the Houſe of Lords, made 24 *March* 1725, Appeals are to be brought within five Years after the Decree or Order, in the Court below, is ſigned and inrolled. 10

Appeals to Seſſions. See alſo Tit. Poor and Tit. Orders.

An Appeal to Seſſions, not ſaying by whom, allowed. 301
Appeal on Poor Rate may be to Borough Seſſions. 325
An Appeal from an Order of the Juſtices, in Relation to the Highways, muſt be to the next Seſſions. 327

Appointment.

Appointment of Eſtate purſuant to a Power, where good. 339

Apprentice. See alſo Tit. Poor.

Apprentice, how to be diſcharged. 312

Arreſt. See alſo Tit. Reſcue.

Whether Caſe will lie for arreſting without Cauſe of Action. *Page* 256
The Anſwer of all the Judges, when demanded by the King, What Remedy was there if a Man bring a falſe Action? 262
It ought to be an Action for falſe Impriſonment. 266

Army.

On the Act concerning Army Accounts. 344

Aſſumpſit.

Difference between a Debt and *Indebitatus Aſſumpſit.* 197
Indebitatus Aſſumpſit lies for Goods ſold from Plaintiff by Defendant. 278

Attainder.

Attainder by Statute, pardoned. 397

Averment.

Nul tiel Record being in the Negative, need not be averred. 339
Variances between a Condition and a Conviction, help'd by Averments, which were not traverſed. 356

Aurum Reginae.

Aurum Reginæ, what. 398
Remedy for *Aurum Reginæ.* 399
Keepers and Receivers of it. *ibid.*
Clerks of her Writs to levy Queen Gold. *ibid.*
In *Edward* IV.'s Time the Queen had 800*l.* for Queen Gold. 400

Bail and Bail-Bond. See alſo Tit. Outlawry.

ON a Conviction for a Forcible Detainer, on a Writ of Error brought, the

the Court will not take Bail. *Page* 39
Nor being in Execution on an Indictment. *ibid.*
A Meſſenger cannot take Bail. 142
Perſons in Execution are frequently bailed while the Return of an *Habeas Corpus* is under the Conſideration of the Court. 242
Bail-Bond to appear on a Day not in Term, ill. 363
Bail-Bond aſſignable, tho' Defendant not arreſted. 364
Sheriff may aſſign Bail-Bond after he is out of his Office. *ibid.*
Bail-Bond, when and where it may be made. 365
The Court will take Notice of its own Practice. *ibid.*
No good Plea to Action by Aſſignee of Bail-Bond. *ibid.*
Action by Aſſignee of Bail-Bond, where to be brought. 366
In ſuch Caſe no need to name Witneſſes. *ibid.*
Action by Aſſignee of Bail-Bond. *ibid.*
Whether Bail-Bond may be for more than the Sum in the Writ. *ibid.*
Action may be brought by the Executor of an Aſſignee of Bail-Bond, it being an Intereſt veſted. 367
Action by Aſſignee. *ibid.* 371
What Bail-Bond ſufficient. 368
What is not Letting a Bailiwick to Farm. *ibid.*
Bail, how to be taken by the Sheriff. 369
Aſſignment to the Uſe of the Plaintiff. *ibid.*
Action by Adminiſtratrix, Aſſignee of Bail-Bond. 370
Bond good without a Date. *ibid.*
Bond to *Marſhal*'s Court Priſon Keeper, how to be pleaded. *ibid.*
The like. 371
Two Witneſſes neceſſary to Aſſignment of Bail-Bond. *ibid.*

Bill of Exchange.

Draught to pay Money out of growing Subſiſtence, whether a Bill of Exchange. 281
Bill of Exchange need not ſay *Value received.* *Page* 282
A Man may draw a Bill on himſelf. *ibid.*

Bond.

Condition of Bond to pay Money, the Plaintiff aſſigned a Judgment which he had recovered, whether it was a Condition precedent. 145
The Aſſignment and Payment to be concomitant. 149
Nothing makes a Bond void but Payment. 150
Tender and Refuſal, how to be pleaded. *ibid.*
Reſignation Bonds are allowable. 351
Bond in Reſtraint of Trade may be good on a particular Conſideration, which is reaſonable. 296
As where the Defendant was taken in as a Servant without Money, where a conſiderable Sum might be reaſonably expected. 298

Certificate. See Tit. Poor.

Certiorari.

A *Certiorari* the moſt proper way to have a Conviction by a Juſtice of Peace examined, and not a Writ of Error. 175

Cheat.

The Judgment againſt a Phyſician for abuſing and cheating a Patient pretending him to be mad. 166

Church.

Church Rate variable. 346
Quakers ſuable in Spiritual Court for Tithes or Repairs of Church, tho' Statutes give Remedy before Juſtices of Peace. 347

Codicil. See Will.

Coin. See High Treaſon.

Commiſſion of Sewers.

On a Clerk of Commiſſion of Sewers being turned out by ſucceeding Commiſſioners, a Rule granted to ſhew Cauſe, and a *Certiorari* to remove the Orders. *Page* 374

Quære, Whether ſuch Clerk be only at Will. *ibid.*

Commitment. Vide alſo Tit. Habeas Corpus.

Commitment in Execution upon a Penal Statute, ought to ſay for how long. 274

Condition and Condition precedent.

No ſet Form of Words to make a Condition, but it muſt be conſtrued according to the Intent of the Parties. 147

A Man deviſes an Annuity charged on his real Eſtate to his Siſter and Heir at Law, (who is a Feme Covert) and a Portion for her Daughter, and by Codicil ſays, On Condition that they releaſe all Right, *&c.* Debt cannot be maintained for the Arrears of the Annuity incurred during the Coverture, the Siſter being dead and not having releaſed. 188

Argument, that this is a Condition precedent. 190

Whether precedent or ſubſequent it ought to be performed. 191

If preciſe Performance be impoſſible, the Party muſt go as near as poſſible. *ibid.*

Words make a Condition in a Will, which do not in a Deed. 192

If it be a Condition ſubſequent it ought to be performed in her Life-time. 195

A Requeſt not neceſſary. *ibid.*

Where two Acts are to be done, and to one a Time is prefixed, but not to the other, that which has a Time prefixed muſt be done firſt. 148

Conſtable.

Indictment for not taking the Office of Conſtable, what it ought to ſhew. *Page* 127

Conſtables of the Hundred are proper Officers of Juſtices of the Peace. 128

An Offence if a Conſtable does not return the Warrant by which he was to levy a Penalty. *ibid.*

Conſtables are Officers at Common Law, and were Conſervators of the Peace. 129

An High Conſtable an Officer at Common Law, and not by Statute, contrary to the Opinion of Lord *Coke*, 4 *Inſt.* *ibid.* 131

Conſtables are made ſubject to Juſtices of Peace by Act of Parliament. 130

That a Conſtable may keep his Warrant if he certifies what he has done thereon. 132

Conuſance.

When and how Conuſance by the Univerſity of *Cambridge* is to be claimed. 155, *&c.*

How the Univerſity is to claim Conuſance. 280

Conviction.

Writing a Libel no good Cauſe of Diſfranchiſment before Conviction. 275

Cauſes of Diſfranchiſing before Conviction or without it. 276

Corporation may remove a Capital Citizen for Offence againſt his Duty, without Conviction at Law. 200

Corporation.

Corporation may remove a Capital Citizen for Offence againſt his Duty, without Conviction at Law. 200

There are two Sorts of Corporations; they are for publick Government; 2dly for private Charity. 299

Difference between them. *ibid.*

Coſts. See Parliament.

No Coſts given at Common Law in any Caſe whatever. *Page* 116
No Coſts are now given in real Actions. *ibid.*
No Coſts given in a *Quare Impedit.* 117
And till of late no Coſts were given in a *Scire Facias* and Prohibition. *ibid.*

Count. See Declaration.

Covenant.

You cannot take Advantage of any Covenant omitted in Plaintiff's Declaration on an Action of Covenant, without craving *Oyer.* 354

Cuſtom.

The Court not bound to take Notice of Cuſtoms, unleſs pleaded. 347

Cuſtom and Copyhold. Vide Evidence.

A Trial at Bar to prove the Cuſtom of a *Tenant-Right* Eſtate, where there is a general Fine on the Death of the Lord in the three Northern Counties. 41
The Cuſtom of other Manors in the ſame Counties allowed as Evidence, why. *ibid.*
Cuſtom that a Copyholder ſhould, upon the Change of every Lord, pay a Fine, is a void Cuſtom. 42
Unleſs the Change be by the Act of God. *ibid.*
Or if the Tenant alters the Eſtate. *ibid.*
Tenant's Right, what. *ibid.*
The Word *Greſham* in Court Rolls from the *Saxon* Word Gæpruma, *Gærſuma* ſignifies *Præmium, Compenſatio.* 43
Thoſe who had like Eſtates, not good Witneſſes. *ibid.*
Proof of Steward's Hand Writing required, tho' above 40 Years. *ibid.*
The Cuſtom of a Tenant-Right Eſtate in the County of *Weſtmorland*, during the Joint Lives of Lord and Tenants, eſtabliſhed by Decree in Chancery. *Page* 44
Arbitrary Fines limited. 45
General and dropping Fines. *ibid.*
Lord cannot alter the Contingencies. 46
Arbitrary Fines have been ſettled by Deeds. *ibid.*
Subſtance of ſuch Deeds. 47
Thoſe Deeds confirmed by Decrees in Chancery. 49
Appendix to the foregoing Caſe. 56
Whether a Lord of a Manor can enter upon his Copyholder in Fee, and cut down Timber, not leaving ſufficient Eſtovers. 152
The Lord of a Manor cannot enter on his Copyholder, and cut down Timber, without the Tenant's Conſent. *ibid.*
A Cuſtom of a Copyholder to cut down Timber, and to ſell it, has been held to be a good Cuſtom. 153
The Tenant may maintain an Action againſt the Lord, becauſe of his Poſſeſſion. 154
Cuſtomary Lands are ſometimes called *Freehold.* 227
Freeholders in a Manor to preſcribe, *&c.* and not to lay a Cuſtom. 339

Day.

INdebitatus Aſſumpſit was laid the 26th of *March*; Defendant pleads a Tender before the Action brought, 2d of *April*; the Plaintiff replies, That after the Promiſe made in the Declaration, and before the *Tender*, he ſued a *Latitat* the 12th of *February* in the ſame Year, returnable, *&c. abſque hoc*, that the Defendant made a Tender before the 12th of *February*; Judgment for the Plaintiff, the Day being immaterial. 375

Damage-feaſant. See alſo Tit. **Treſpaſs.**

Whether in Plea in Treſpaſs for taking Cattle *Damage-feaſant*, the Defendant need ſet out the Title. *Page* 255
Damage-feaſant pleaded in Treſpaſs, *&c.* 381

Dean and Chapter.

A Grant of the Crown which was void at Law, made Effectual by an Act of Parliament, which amounts alſo by Implication to a Diſpenſation with the Statutes againſt Pluralities, and the local Statutes of a Dean and Chapter. 222
Where the Intereſt of a Prebendary cannot be bound by a Majority of the Dean and Chapter. 223
Dean and Chapter where of Royal Foundation, not Viſitable by the Biſhop. 329

Debt.

Difference between Debt and *Indebitatus Aſſumpſit.* 197

Declaration. See alſo **Demurrer.**

Where a Declaration need not conclude *Tam pro Domino Rege quam pro ſeipſo.* 278
A Statute, how to be laid in the Declaration. 372
In Battery, two Counts, the firſt good, the ſecond was with a *Cumque etiam*, and intire Damages; Judgment was arreſted. 376
Count ought to be poſitive and affirmative. *ibid.*
Count helped by Plea. 377

Deed.

Difference between a Deed and a Will, as to Latitude of Conſtruction, the Reaſon. 21
The Conſtruction of the Word *Iſſue* in a Deed. *Page* 138

Delivery.

Delivery of Goods to a third Perſon in Satisfaction for a Debt, by a Perſon, who after Delivery becomes a Bankrupt, Good, tho' *Ceſtuy que Truſt*, not having Notice, did not aſſent until after the Bankruptcy. 353

Demurrer.

Demurrer to the Declaration, for that there were no Pledges to the Writ, Judgment for Plaintiff, for he may enter Pledges at any Time. 330

Departure.

What is a Departure. 333
Rejoinder which fortifies the Bar is not a Departure. 341
A Replication which purſues the Declaration, is no Departure. 349

Deviſe and Executory Deviſe. Vide **Will.**

Diſfranchiſement.

Writing a Libel, no good Cauſe of Diſfranchiſement before Conviction. 275
Conſent to be turned out, is not a Reſignation. *ibid.*
Cauſes of Disfranchiſing before Conviction or without it. 276

Diſpenſation. See **Dean and Chapter.**

Diſtreſs.

Diſtreſs of *Carectat' tritici* for Arrears of an Annuity, good. 361

Duties. See Tit. **Information.**

What is the true Method of computing the Duties on unrated *Eaſt India* Goods upon Stat. 2 *Anne* and ſeveral other

other Statutes, and what Allowances are to be made. *Page* 1
Diſtinction between the Groſs and Neat Duties on ſuch Goods. *ibid.*
The right and true Method for aſcertaining the Values and computing the Duties of ſuch Goods. 7, 14, *&c.*
Decree of the Court in Favour of the Crown. 7
Proceedings in Purſuance thereof before the Deputy Remembrancer. 8
A State of the Method of computing the Neat Duty. 10
The Computation may be made by the Golden Rule of common Arithmetic. 13

Eaſt India Goods. See **Duties.**

Error.

Writ of Error. Vide **Outlawry.**

A Writ of Error in all Caſes, except Treaſon and Felony, is granted *ex Debito Juſtitiæ.* 37
Severe Conſequences of refuſing a Writ of Error. 38
The Writ allowed on Outlawry for Murder, the Witneſſes being alive. 39
Reaſons againſt Error in Treaſon and Felony. 40
Writ of Error granted to reverſe an Outlawry on an Indictment for a ſcandalous Libel. *ibid.*
By the Death of the King, a Writ of Error in Parliament abated; the King being a Party, and the Return falling within the Reign of the Succeſſor. 213
The Reaſon. *ibid.*
A Writ of Inquiry executed on a *Sunday*, naught, and Advantage may be taken on Writ of Error, tho' not aſſigned for Error. 373

Eſtate. See alſo Tit. **Will.**

Eſtate in Fee-Simple.

The Word *Heirs* not neceſſary in a Will to create a Fee. *Page* 63
Deviſe of Lands to one, paying to another a Sum in Groſs, or an Annuity for Life carries a Fee. *ibid.*
So a Deviſe of Lands to *A.* paying ſeveral Annual Sums, was a Fee-ſimple. *ibid.*
And ſo is a Deviſe of all my Eſtates and Hereditaments. *ibid.*
Tho' in a Deviſe to Truſtees the Word *Heirs* is omitted, yet ſince the Truſts which are to ariſe out of their Eſtate are to continue for ever, the Truſtees take a Fee. 69

Eſtate-Tail. See alſo Tit. **Will, Deviſe.**

Deviſe to *Evers Armin* for Life, and in caſe he ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs; this held to be a good Deviſe to the firſt Son and Heir Male in Tail, and that he took by Purchaſe. 28
Conſtruction of a Will of Lands, whether it gave an Eſtate for Life only, or an Eſtate-Tail. 53
A Deviſe to one and his Iſſue, he then having none, is an Eſtate-Tail. 65
Deviſe to one for Life, and after his Deceaſe to his Children, and that if he died without Iſſue, Remainder to *J. S.* ſuch Deviſe did not take an Eſtate-Tail. 69
The Words *If* Thomas *have no Male Iſſue, then* William *to have the Eſtate*, create a Tail. *ibid.*
An Eſtate-Tail cannot in a Deed be raiſed by Way of Uſe, without the Word *Heirs*, but otherwiſe in caſe of a *Will.* 74
When *Iſſue* ſhall give an Eſtate for Life only. 78
Deviſe to *A.* for Life only *ſans Waſte*, Remainder to the Iſſue Male of his Body lawfully to be begotten, Remainder to the Heirs Male of the Body of

of ſuch Iſſue, &c. Whether it be an Eſtate for Life or an Eſtate-Tail. *Page* 133
Implication muſt not prevail againſt expreſs Words. 134
By *Lechmere* that it is an Eſtate-Tail. 137
By *Parker*, that it is an Eſtate for Life only. 139

Eſtate for Life. See Eſtate-Tail.

When *Iſſue* ſhall give an Eſtate for Life only. 78

Evidence. See Cuſtom, Copyhold.

Evidence of a Cuſtom in one Manor, not allowed to prove a Cuſtom in another. 41
But allowed in the three Northern Counties of *Cumberland*, *Weſtmorland* and *Northumberland*. *ibid.*
Proof of Hand Writing required, tho' above forty Years old. 43

Executor.

An Executor of a Landlord ſhall have the ſame Benefit of the Act againſt an Execution, as the Teſtator might have had if living. 359
So an Adminiſtrator, but muſt come before Execution. 360

Expoſition of Words. See alſo Will.

Difference between a Deed and Will as to Latitude of Conſtruction, the Reaſon for it. 21
No Words in a Will to be rejected if they may have a reaſonable Conſtruction. 25
The Words *in Default of ſuch Iſſue*, make an Eſtate Tail. 30
Iſſue is ſometimes a Word of Purchaſe. 73
Iſſue when a Word of Purchaſe, how conſtrued. 74
Where Words may be rejected, or not. 76
Objection againſt *Iſſue* being *Deſignatio Perſonæ*. *Page* 81
Iſſue, its Conſtruction in a *Will* and in a *Deed*. 138
The proper Meaning of theſe Words *The Reſt and Reſidue of all my Lands*. 182, 184
Muſt be meant the Reſidue at the Time of making the Will. 183
Court held (in the Caſe of a Deviſee dying in Teſtator's Life-time) that a Deviſe of the Reſidue would not convey what was expreſly deviſed before. *ibid.*
Eſquire and *Gentleman* no Variance, tho' the former mentioned in the Record and the latter in the Judgment. 354
Conſtruction of the Black Act as to Diſguiſe. 388

Extent.

Leave given to iſſue an Extent upon a Statute Staple into all the Counties of *England*. 373

Failer of Record.

FAiler of Record, what. 353

Fine.

An Ideot or Infant may levy a Fine. 192
A Feme Covert may alſo. *ibid.*

Forcible Detainer. See alſo Tit. Indictment.

Conviction for a Forcible Detainer. 173
Forcible Detainer puniſhable, tho' the Entry was peaceable. *ibid.*
The Juſtice may Fine. *ibid.*
He that can convict may ſet a Fine. *ibid.*
Whether Formality neceſſary. 174
Forcible Detainer only appears on View. *ibid.*
Rule where Matter is found on an Act of Parliament. *ibid.*

Difference between Conviction and Indictment. *Page* 174
It cannot appear on View, what Eſtate he had. *ibid.*
A *Certiorari*, the moſt proper way to have ſuch Conviction examined, not a Writ of Error. 175
Forcible Detainer, puniſhable by Indictment. 176
Conviction affirmed. *ibid.*

Guardian and Guardianſhip.

Diſtinction between Guardianſhip by Tenure and by Prerogative. 433
The Judges aſſemble by the King's Order, and gave the Grand Opinion, wherein ten of the twelve Judges held that the Care of the Perſons of his Majeſty's Grand Children, and the ordering the Place of their Abode, and appointing Governors, *&c.* and the Care of their Marriages when grown up, belongs to his Majeſty as King of this Realm. 435, 436
Two of the Judges *contra.* 438, 439

Habeas Corpus. See High Treaſon.

LORD Chancellor *Macclesfield*'s Opinion on the *Habeas Corpus* Act. 102
Habeas Corpus if it lies for a Foreigner. 195
Habeas Corpus to a Father to bring up his Daughter. 196
Has been in Caſe of a Wife. *ibid.*
Habeas Corpus in Term-Time, returnable on a Day certain, and not *immediatè*. *ibid.*
Court refuſes to grant the *Poſſe.* 197
How the Keeper of *Newgate* ought to mention himſelf in returning an *Habeas Corpus.* 242
Perſons in Execution are frequently Bailed, while the Return of an *Habeas Corpus* is under the Conſideration of the Court. *ibid.*
To whom an *Habeas Corpus* ought to be directed. 243
An *Habeas Corpus* ought not to be directed to ſeveral Perſons in the Diſjunctive. *Page* 243
Whether Perſons in Cuſtody in *B. R.* be removable to any other Priſon. *ibid.*
Procedendo awarded where the Plaintiff removed the Cauſe by *Habeas Corpus* after Notice of Trial. 244
Whether *Habeas Corpus cum Cauſâ* lies to the Stannary Courts in *Cornwall.* *ibid.*
The Lord Warden is to come and claim his exempt Juriſdiction. *ibid.*
Whether an *Habeas Corpus ad reſpond'* will lie to bring a Perſon into *B. R.* who is in Execution in a Civil Cauſe in the Admiralty. 245
Habeas Corpus de placito quod reddat does not lie without an Original. 246
Procedendo awarded where the Return of *Habeas Corpus cum Cauſâ* was at too long a Day. 268
An *Habeas Corpus* does not remove the Record as a *Certiorari* does. 269
Difference between theſe Writs. *ibid.*
Superſedeas granted to *Habeas Corpus*, *&c.* to Mayor's Court in the County Palatine of *Cheſter.* 270
Habeas Corpus ad teſtificand' moved for. 271, 396
Habeas Corpus to bring up a Priſoner to attend her own Trial. 271
Habeas Corpus ad teſtificand' before Juſtices of Peace. *ibid.*
Difference in Return of *Habeas Corpus* before and after Conviction. 272

Heirs. See Tit. Remainder, Eſtate, and Tit. Deviſe.

Whether a Remainder, which is limited by Will to the Heirs Male of the Body of a Perſon who is living when the Remainder ſhould take Effect, be a good Remainder. 20
Such Remainder held good. 31
The Various Significations of the Word *Heirs.* 22, 23
That *Heir* may ſignify the *Heir Apparent.* 22

Where the Intention was, that the Deviſee ſhould take as Heir Apparent, when his Mother was mentioned as living. *Page* 24
Iſſue of the Body of the ſame Import as *Heirs of the Body.* 28
Deviſe to *Evers Armin* for Life, and in Caſe he ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs, held to be a good Deviſe to the firſt Son and Heir Male in Tail, and that he took by Purchaſe. *ibid.*
The Words *Heirs of the Body now living* will make an Eſtate-Tail, tho' the Son took by Purchaſe. 29
The Word *Heirs* not neceſſary in a Will, to create a Fee. 63, 69
So the Truſtees in a Will, when ſeveral Eſtates are limited to ariſe out of their Eſtate, which may continue for ever, ſhall be conſtrued to have a Fee without the Word *Heirs.* 62, 63
Heir uſed as a *Deſignatio Perſonæ.* 77

High Treaſon.

Perſons who are committed to the *Tower* for High Treaſon, cannot make their Prayer at the *Old Baily* to be tried or bailed. 101
Their Commiſſion at the *Old Baily* is to deliver the Gaol of *Newgate.* *ibid.*
No Commiſſion of *Oyer* and *Terminer* for *Middleſex.* *ibid.*
Lord Chancellor *Macclesfield*'s Opinion on the *Habeas Corpus* Act. 102
Treaſon, when and where triable. *ibid.*
One committed for High Treaſon to the *Gate-houſe*, moved to enter his Prayer at the *Old Baily*, refuſed. 103
Attainder by Statute, pardoned. 397
One Witneſs enough in High Treaſon for Waſhing Guineas. *ibid.*

Highways.

Court adjudged the Incloſure of Highways was to the Damage of ſeveral Perſons, and ordered the Incloſure to be thrown open. 251
The Effect of an *Ad quod dammum* as to altering an Highway. *Page* 251
At what Seſſions Appeal to be brought. *ibid.*
The Writ is to be returned into Chancery. 252
Tho' the Return be favourable, a Licence is neceſſary. *ibid.*
The *next* Seſſions is the *next* after the Grievance. 253
Indictment for incloſing an Highway, what to ſet forth. *ibid.*
Surveyors of Highways to account at Special Seſſions, and not at General Seſſions; in ſuch Caſe a *Certiorari.* 254
Perſons indicted and found guilty for not repairing an Highway, being indulged with Time to repair it, ſhall pay Coſts to the Proſecutor. *ibid.*
Streets and Highways in *London* and *Middleſex*, an Order for cleaning them, good. 315, 316

Idiot. See Tit. Lunatick.

Indictment. See alſo Libel.

INdictment for not taking the Office of Conſtable, what it ought to ſhew. 127
Indictment againſt a Conſtable for not returning a Warrant to levy a Penalty. *ibid.*
The Difference between ſuch Warrant and a *Fieri Facias.* *ibid.*
In ſuch an Indictment, where ſuch Neglect happens in the King's Time, and continues in the Queen's Time, it ought to be ſaid *Contra pacem* of the Queen as well as of the King. 128
An Indictment founded on an Omiſſion, never concludes *Contra pacem.* 131
Forcible Detainer, puniſhable by Indictment. 176

Information. See Tit. Duties.

Information in Regard to the Method of computing the Duties on unrated

Eaſt India Goods, upon Stat. 2 *Anne*, and ſeveral other Statutes. *Page* 1
Information grounded on the Statute of 10 *Anne*, prohibiting, under a Penalty, the Mooring of any Ships at the Queen's Moorings. 32
Held good, tho' the Averments not ſtrictly within the Statute of 10 *Anne*. 33, 34
Amendment of Information on Statute of *Uſury*, refuſed, becauſe a popular Action. 232

Iſſue.

Iſſue is properly a Word of Purchaſe, and is ſo conſtrued, unleſs the Teſtator's Intent appears to the contrary. 65
Is *Nomen collectivum*, and as extenſive in a Will, as *Heirs of the Body*. *ibid.*
Iſſue is a Word of Limitation and more expreſſive than *Heir of the Body*, for it extends to all Iſſues that can poſſibly be. 67
Iſſue is ſometimes uſed as a Word of Purchaſe, and ſometimes as a Word of Limitation. 74
When a Word of Purchaſe, how conſtrued. *ibid.*
The Difference between the Word *Iſſue* in a Conveyance and a Will. 78
When Iſſue is *Deſignatio Perſonæ*, it can only carry an Eſtate for Life to him whoſe Iſſue are to take by ſuch Deſignation. *ibid.*
The Word *Iſſue* in a Will, where there is no Iſſue in Being, is a Word of Limitation, and takes in the whole Generation. 84

Judgment.

A Judgment ought to be poſitive and not conditional. 250
Of the King's pardoning Part of the Judgment in High Treaſon. 385

Judge and Judges.

Precedence of Judges on Promotion to a ſuperior Court. 382
Judges are Aſſiſtants *in Dom' Proc'*. *Page* 384
Declined giving Opinion on a Competition for the Crown. *ibid.*
Uſual to aſk the Judges Opinions in the Houſe of Lords, on repealing or making any Law. *ibid.*
And on Queſtions which may come judicially before them. 385
Lord Chief Juſtice of *England*, his Precedence of old. *ibid.*
Salaries of Judges. 386
Diet in Circuits. 387
When covered *in Dom. Proc'*. *ibid.*
On the Demiſe of the Crown, the Judges thought it ſafeſt not to intermeddle till they had new Patents. 389
Judges Opinions in Criminal Caſes. *ibid.*
The Modern Practice. 390
Judges are the King's Counſel. 392
An Extrajudicial Opinion condemned as High Treaſon. *ibid.*
Chief Juſtice, how ſworn. *ibid.*
Where Law doubtful, Reaſon to prevail. *ibid.*
The Diſcretion of the Judges, what. 393
They are not to regard Letters, *&c.* *ibid.*
Continuance of their Commiſſions. *ibid.*
Chief Juſtice of *B. R.* how called in old Hiſtories. 395
Judges conſtrue Statutes. 396
The Judges aſſembled by the King's Order, and gave the Grand Opinion, wherein ten of the twelve Judges held that the Care of the Perſons of his Majeſty's Grand Children, and the ordering the Place of their Abode, and appointing Governors, *&c.* and the Care of their Marriages when grown up, belongs to his Majeſty as King of this Realm. 435, 436
Two Judges *contra*. 438, 439

Juriſdiction.

Danger of Claſhing of Juriſdictions. 117
Rule as to Admitting the Juriſdiction of inferior Courts. 176
Return which would ouſt the Court of Juriſdiction, refuſed to be amended. 273

Jury.

The Jury not bound by a Determination of the Houſe of Commons, nor by any Law in the World but their own Conſciences; the Reaſon why. *Page* 117

Juſtification.

Juſtification in Treſpaſs. 378
Juſtification in Treſpaſs and falſe Impriſonment by *Capias Utlegat'*. 379
Treſpaſs, Juſtification by Officer. 380

Law Penal.

THO' a Law be in ſome ſort Penal, yet if it is a remedial Law, and beneficial for the Publick, it ſhall have a liberal Conſtruction. 34
If a Statute be beneficial to many, and puniſh but a few, it is called *A gracious and beneficial Law.* *ibid.*

Libel.

An Indictment for printing and publiſhing a Libel, intitled *The fifteen Plagues of a Maidenhead.* 98
Whether a Perſon certain muſt be named, *&c.* to conſtitute the Offence of libelling. *ibid.*
Printing Bawdry which reflects on no Perſon, not puniſhable by Law. 99
An Indictment quaſhed when for Matters of Bawdry. 100
By the Civil Law a Perſon convicted of publiſhing a Libel was eſteemed Infamous, ſo that he could not make a Will, or be an Executor or Legatee. *ibid.*
But in *The King* and *Curl*'s Caſe in *B. R.* in an Indictment for publiſhing a Libel and Bawdy Expreſſions, Judgment was given againſt the Defendant. *ibid.*
Whether a Secretary of State may lawfully commit a Libeller without Oath, *&c.* 140
That no Commitment ought to be for a Libel, until Indictment. *Page* 140
It is too late to except to the Commitment after entring into Recognizance. 142
A Secretary of State may ſend for and examine an Offender. *ibid.*
A Meſſenger cannot take Bail. *ibid.*
The Secretary's Warrant, legal. *ibid.*
One fined on Confeſſion in Court, that he was the Author of a Libel. 201
Writing a Libel no good Cauſe of Diſfranchiſement before Conviction. 275
Time for Notice of Trial on an Information for a Libel. 357

Licence.

Licence to preach, by whom grantable. 345

Limitations, Statute of Limitations.

What Words will bring a Plaintiff out of the Statute of Limitations. 177
Where ſpecial Promiſe laid, ſhall be proved. 180
Promiſe to the Adminiſtrator good, without a new Conſideration. *ibid.*
Acknowledging of a Debt after ſix Years, takes it out of the Statute. 181
That there is no Promiſe in Law. *ibid.*
Not neceſſary to name the Partner of the Inteſtate who died before him. *ibid.*

Lunatick.

The Judgment againſt a Phyſician for abuſing and cheating a Patient, pretending him to be a Lunatick. 166
To ſtand in the Pillory, to be ſent to the Houſe of Correction, to be whipped Naked, and kept there one Year, to be fined 600*l.* and find Sureties for good Behaviour for Life. 167

Mandamus.

RETurn of a *Mandamus* to reſtore an Officer returned guilty of Bribery. 200

Mandamus to reſtore to Degrees in the Univerſity. *Page* 202
Antiquity of theſe Writs, uſed to expedite Juſtice, and prevent Oppreſſion. 204
This *Mandamus* proper. *ibid.*
Upon an ill Return to a *Mandamus*, the Court ordered a peremptory *Mandamus*, for want of Summons. 205
Whether a *Mandamus* lies to the Lord Mayor of *London* to return to the Court of Aldermen, Perſons elected. 283
Whether the Court of Aldermen can give ſufficient Relief in ſuch Caſe. 287
A *Mandamus* not grantable where a Man will be liable to an Action for obeying it. 290

Manor. See Tit. **Cuſtom and Copyhold.**

Mariners.

Ship Carpenter within Stat. 2 *Anne*, for diſcharging Mariners. 231

Maſter and Servant.

The Maſter anſwerable for his Servant's Negligence. 34

Maſter of a Ship.

Maſter of a Ship prohibited to ſue the Part-Owners in the Admiralty, for Seamens Wages which he had paid. 230

Money in Court.

The Effect of taking Money out of Court. 237

Notice.

TIME for, and Effect of Notice for Trial on Information for a Libel. 357

Notice of coming into Pariſhes. See **Pariſh**, and alſo Tit. **Poor.**

Orders of Juſtices of the Peace. See alſo **Poor.**

ORDER for one Pariſh to relieve another, by whom to be made. *Page* 303
Order of Juſtices quaſhed at Seſſions, cannot be quaſhed alſo in *B. R.* 306
Order of Removal, ſhould ſay laſt Settlement. 307
Order of Seſſions affirmed upon the Defendant's not Appearing. 308
Certioraries to remove Orders of Settlements. 309
An Order of Juſtices for the Pariſh to pay a Surgeon for curing the Leg of a Poor Perſon, quaſhed, for that it did not appear that the Churchwardens and Overſeers employed the Surgeon. 313
An Order quaſhed for want of ſaying *The Child of a Perſon unknown.* *ibid.*
The like Reſolution. 314
Order quaſhed for not purſuing the Words of the Statute. *ibid.*
Of what Wages Juſtices of the Peace have Cognizance. 317
Orders of Juſtices where they have Juriſdiction, not eaſily ſet aſide. 318
Settlement gained by Service where Servant lies, whether Maſter has Settlement or not. *ibid.*
Farmers of Tithes under Compoſition, ratable to the Poor. *ibid.*
An illegal Order of Removal ſhall not prejudice. 315
A Child, where there is a Separation *a Menſâ & Thoro*, when to be held a Baſtard, and an Order for his Removal as ſuch, Good. *ibid.*
An Order on Inhabitants to clean Streets, good. *ibid.*
An Order of Juſtices good on the Act for poor Priſoners, unleſs it appears that they have no Juriſdiction. 316

The Words *Single Woman* ſufficient in an Order, tho' the Words of the Statute are *Unmarried Perſons. Page* 316
In Orders of Juſtices preciſe Certainty not neceſſary. 322
Orders of Juſtices, how to be drawn. 323
Order for Perſons Wandering. *ibid.*
No need to ſet out Summons in an Order. 325
County, in Margin of Order, not ſufficient. *ibid.*
Order to rate one Pariſh in Aid of another, how to be made. 326
Orders for Highways, how to be. 327
And when the Appeal. *ibid.*
An Order of Juſtices appearing to be contrary to a former, is void. *ibid.*
Where Service muſt appear in an Order for a Settlement. 328

Outlawry. Vide Error.

Antiently no Perſon could be Outlawed but for Felony or Treaſon, and the Puniſhment was Death; but afterwards Proceſs of Outlawry was ordered to lie in all Actions that were *Quare Vi & Armis*; and ſince by divers Acts of Parliament, Outlawries lie in Debt, Account, Caſe, *&c.* 37
Plea of Outlawry does not abate the Writ, it is only a Diſability of the Perſon till he ſues out a Charter of Pardon. 38
Outlawries, by what Means reverſible. *ibid.*
In Outlawry for Murder, a Writ of Error never denied, if Witneſſes living. 39
Effect of Outlawry for a Miſdemeanor. *ibid.*
Outlawry, no Conviction in Miſdemeanors. *ibid.*
Different Courſe of reverſing an Outlawry in *B. R.* and *C. B.* *ibid.*
In perſonal Actions, Outlawry may be reverſed without putting in Bail. *ibid.*
On a Writ of Error to reverſe an Outlawry, the Court will take Bail. *ibid.*
In an Indictment, refuſed to Bail the Defendant being in Execution. *ibid.*
Outlawry is a Conviction in Treaſon nd Felony. *Page* 40

Overſeers of the Poor. See Tit. Poor.

Parliament and Members of Parliament, and Privilege.

OFFICE of Member of Parliament, what. 110
An Action for a falſe Return of a Member of Parliament. 104
The Declaration, ſetting forth the Writ delivered to the Sheriff, *&c.* *ibid.*
The Action lies not at Common Law, becauſe without Precedent. 108
Anſwer to the Objection from new Actions on the Caſe. 109
The Reaſon why Actions lie for falſe Returns, holds not in this Caſe. *ibid.*
Office of Member of Parliament formerly thought a hard Service. 110
Etymology of Knights of the Shire. *ibid.*
Parliamentary Right, how Originally created. 111
Stat. of 7 *W.* 3. 7. extends only to two Caſes, *i. e.* to a double Return, and to a falſe Return, contrary to the laſt Determination of Parliament. 123
The Right is a Parliamentary Right, therefore the Remedy muſt be Parliamentary. 111
The Remedy given by Stat. 23 *H.* 6. 112
The Act ſuppoſes that no Action lay at Common Law. *ibid.*
The Privileges of the Houſe of Commons are concerned. 114
A Port-Reeve, what. *ibid.*
The Return of Precepts given him by Act of Parliament. *ibid.*
He is an Officer of the Houſe of Commons, as to Returns, *&c.* therefore only puniſhable there. 114
The Chancery cannot amend theſe Returns. 115
The Commons ſometimes give Coſts. 116
Danger of Claſhing of Juriſdictions. 117

'Tis the Falſity and Malice is the Foundation and Gift of the above Actions. *Page* 120
If an Action could lie, it muſt be before the Plaintiff recover'd his Seat in Parliament. 122
Judgment arreſted, for that ſuch Action would not lie. 124
There cannot be an Action upon the Caſe and upon the Statute too. 126
Concerning Privilege of the Parliament. 159
A Defendant intitled to Privilege cannot be arreſted within two Days after Diſſolution of the Parliament. 160
A Writ of Privilege is the antient Way to get a Diſcharge. *ibid.*
The Statute has made two Alterations. 161
A Rule made to diſcharge Defendant's Perſon, on filing Common Bail, but that no Diſcharge to the Suit. 164
Several privileged Perſons may be diſcharged on Motion. 163, 164
Waiver of Privilege, how to be. 164
A *Scotch* Peer, tho' not in Parliament, diſcharged from an Arreſt on Motion. 165
A Grant of the Crown, which was void at Law, made Effectual by an Act of Parliament, which amounts alſo by Implication to a Diſpenſation with the Statutes againſt Pluralities, and the local Statutes of Dean and Chapter. 222
Privilege of Parliament allowed without pleading. 342
Affidavit ought to be as full as Plea of Privilege. *ibid.*
Privilege of Attorney not pleadable againſt the King. *ibid.*
Privilege in *C. B.* by Officer of *B. R.* *ibid.*
Plea of Privilege by Attorney. 343
Venue in Privilege may be in remote County. *ibid.*
Plea of Privilege by Attorney of *C. B.* *ibid.*
Summonitus inſtead of *Attachiatus* in caſe of a Member of Parliament. 341
Privilege of Peerage, not allowed on Breach of Peace. 359
Bail may ſurrender ſuch Perſon, tho' the Party came in of himſelf, but the Recognizance not being there, it could not be done. *Page* 359

Pariſh. See alſo Tit. **Poor**, and Tit. **Orders.**

Where a Pariſh has different Liberties, who may make Rates. 324
On Diviſion of Pariſhes, how Rates are to be made. *ibid.*
Notice of coming into a Pariſh, where not neceſſary. 326
Order to rate one Pariſh in Aid of another, how to be made. *ibid.*

Pauper.

Pauper, if Vexatious, to be diſpaupered. 319
Pauper ſhall pay no Coſts, tho' diſpaupered. 320

Peers of the Realm.

Where Lords Proxies are ill. 394
When to anſwer on Oath, or not. *ibid.*

Penalty. See alſo Tit. **Conſtables.**

If there be two Convictions againſt one Man, and he can pay one Fine, and not the other, he ſhall ſtand in the Pillory for that which he cannot pay; but if one Conviction only, and he wants 20*s.* only of the full Penalty, he ſhall keep his Money and ſtand in the Pillory. 132

Pleas and Pleading. See alſo **Abatement, Tender, Refuſal.**

Plea of Alien Enemy, how to be pleaded when in Abatement of the Writ, and when in Bar. 221
There was a Plea of an Alien Enemy to a *Scire Facias* on a Judgment in Aſſize, and held no good Plea after a Judgment of Recovery in Freehold, but to the Original Action it would be a good Plea. 222

Plea

Plea *De injuria ſua propria* in Bar of Conuſance for Diſtreſs, whether to conclude to the Country. *Page* 233
Where the Matter comes in with an *Abſque hoc*, there muſt be an Averment. 234
Ought to plead *Riens* Arrear directly in Replevin, but not ſo in Treſpaſs. *ibid.*
Tender, where a good Plea. 235
Plea of Tender and Refuſal not enough, unleſs he pleads always ready. 150
Not a ſufficient Plea of Tender, without an *Obtulit*. 235
Parat' eſt, not a good Plea of Tender. 236, 237
It is an impertinent round about way of pleading the General Iſſue, and amounts to no more than *Riens* in Arrear, and ſo ill on Special Demurrer. 238
Attorney pleading his Privilege need not plead the Preſcription, for the Court will take Notice of it. *ibid.*
Whether in Plea in Treſpaſs for taking Cattle *Damage-feaſant*, the Defendant need ſet out the Title. 255
Conſtruction to ſubſtantiate Pleading. 329
Plea that the Defendant had removed the Nuſance, ill. 333
Departure. *ibid.*
Plea of Bankruptcy to conclude to the Country. 334
Plea of Writ, how to conclude. *ibid.*
Plea of Infancy, how to conclude. *ibid.*
Plea that the Writ teſted before Action accrued, how to conclude. *ibid.*
The Concluſion makes the Plea. 335
Double Plea. *ibid.* 336
Replication, not within the Act. 335
Double Plea in Treſpaſs. *ibid.* 336
Double Plea in *Quare Impedit*. 337
Double Pleas and Treble Plea. *ibid.*
Double Plea, Iſſue taken on one of them, how to proceed. 338
Releaſe after Action brought, when to be pleaded. *ibid.*
Pleas of Privilege. 341
Plea of Juſtification by Proceſs in inferior Court. 344
Plea to Action of Treſpaſs and Battery, what to traverſe. *Page* 359
In Debt for Rent, Entry and Seiſin by a third Perſon, no good Plea. 360
Muſt ſhew an elder Title. *ibid.*
The like. *ibid.*
Plea in Replevin. 362
Nil debet no Plea to a Bond. 363
No good Plea to Action by Aſſignee of Bail-Bond. 365
The Statute of 2 *Geo.* 2. for Relief of Inſolvent Debtors, how pleaded. 372
A Tender pleaded before Action brought. 375
Tender pleaded after Imparlance. 376
Tender pleaded. *ibid.*
Repugnant Pleas. 380
Damage-feaſant pleaded in Treſpaſs. 381

Pledges.

When Pledges may be entered. 330
The Sheriff's Duty in taking Pledges in Replevin. 331

Poor. See alſo Tit. Orders of Juſtices.

Settlement of Poor.

Reſidence for Education does not gain a Settlement. 214
Where the Settlement of the Wife or Mother, or by Birth, ſhall take Place. 217
Whether the Settlement of the Father is the Settlement of the Children. 218
The Mother in her Widowhood may gain a Settlement for the Children under ſeven Years of Age. *ibid.*
Stat. 13 & 14 *Car.* 2. extends to all the Counties in *England* and *Wales*, *viz.* As to appointing Overſeers of the Poor in Townſhips where Pariſhes are too large. 219
Extraparochial Places (if Towns or Vills) ſeem to be within it. *ibid.*
But not if they be not Towns or Vills 220
In ſuch Caſe a Man muſt be ſent to his laſt legal Settlement. *ibid.*

Servant gains a Settlement in the Parish where he lies. *Page* 221
Whether a Parish-Clerk gains a Settlement. 239
Commitment of Overseers of the Poor for not accounting, how to be. 272
Attestation by Justices of a Certificate for Poor, doth not import their Allowance of it. 301
Appeal to Sessions, not saying by whom, allowed. *ibid.*
Statute for Year's Service to gain Settlement, has no Retrospect. 302
Settlement, by what Estate gained. *ibid.*
What not a good Hiring for a Year. 303
Order for one Parish to relieve another, by whom to be made. *ibid.*
A Man not obliged to maintain his Wife's Mother. *ibid.*
Neither is the Wife. *ibid.*
The Parish which gave a Certificate to Persons as Man and Wife and their Children, not allowed afterwards to controvert the Marriage. 304
Annual Office gains a Settlement. *ibid.*
Whether a Year's Service good where some Days are wanting upon particular Reasons, as Sickness, going to see a Parent, going to be Hired. 305
A Man is an Inhabitant where his Bed is. 306
Defendant being a Dissenting Minister, was rated upon 43 *Eliz.* as Occupier of a Meeting-House, the Order was quashed. *ibid.*
Order of Justices quashed at Sessions, cannot be quashed also in *B. R.* *ibid.*
Child of former Husband, where to be settled. 307
Birth *prima facie* gains a Settlement. *ibid.*
Service for a Year, Part in one Parish Part in another, Settlement in the last. 308
Windmill a Tenement to make a Settlement. 309
Where a Widower may gain a Settlement by Service, tho' he has a Child. *ibid.*
Freehold or Copyhold gains a Settlement for a Man and his Children, tho' born before. *Page* 310
Service to gain Settlement must be on one Contract. *ibid.*
What Office or Tax gains a Settlement. *ibid.*
Hiring and Service for a Year, necessary to gain a Settlement. 311
Settlement not gained by Boarding. *ibid.*
Or by Licence to sell Ale. 312
A Freehold a good Foundation for a Settlement. *ibid.*
An Apprentice, how to be discharged, so as to prevent a Settlement. *ibid.*
Settlement, when not gained by Birth. 313
A Woman doth not lose her Settlement by marrying a Man who hath none. 314
Settlement gained by Service to two successive Masters upon one Hiring. 317
Overseers of the Poor, how to be nominated. 320
Child is settled where the Father is settled. *ibid.*
Settlement gained by Service where Servant lies, whether Master has a Settlement, or not. 318
Apprentice of Certificate Man, gains a Settlement. 315
What Hiring and Service good to gain a Settlement. 316
Servant gains a Settlement where he Lodges. 321
An Apprentice cannot hire himself without his Master's Consent, so as to make a Settlement. *ibid.*
Justices of Peace may appoint Overseers of the Poor in Extraparochial Places. *ibid.*
The Settlement of the Father is the Settlement of the Child. 322
Hiring to gain a Settlement ought to be for a whole Year. *ibid.*
A Child under fourteen Years, to be sent after Father or Mother. 323
Appeal on Poor Rate may be to Borough Sessions. 325
Notice of coming into a Parish, where not necessary. 326

A Mother may gain Settlement for a Child ſubſequent to the Father's. *Page* 328

Power, and Execution thereof.

In Execution of Powers, all Circumſtances to be obſerved. 332
Appointment of an Eſtate purſuant to Power, where good. 339

Preſcription.

Freeholders in a Manor to preſcribe, *&c.* not to lay a Cuſtom. 339
Leſſee for Years cannot preſcribe. 340
Preſcription to cut down Trees. *ibid.*
Preſcription for all the Profits of Land for Part of the Time, and for Part of the Profits all the Year, is a good Preſcription. *ibid.*
Preſcription for Seats in Churches. 346

Prerogative.

No Prerogative to hinder the Building Ships of War. 388
Ten of the twelve Judges for the Prerogative, in the Caſe of the Education and Marriage of the King's Grand Children. 435
Two Judges againſt it. 438

Proceſs.

When a Priſoner is in Court, he may be committed without any Proceſs. 242

Procedendo.

Procedendo awarded where the Plaintiff removed the Cauſe by *Habeas Corpus* after Notice of Trial. 244
Procedendo awarded where the Return of *Habeas Corpus cum Cauſa* was at too long a Day. 268

Prohibition.

Prohibition to the Spiritual Court. 199
There can be no Prohibition after Sentence, tho' it be not on the Merits, for they might have appealed. *Page* 199
Prohibition denied to a Seaman's Suit in the Admiralty for Wages upon a Contract with a Freighter, it need not be *ſuper altum mare.* 230
Maſter of a Ship prohibited to ſue the Part-Owners in the Admiralty for Seamens Wages which he had paid. *ibid.*
There are two Things in Prohibition, Contempt of the Crown, and Diſheriſon of it. 345
Prohibition denied after Sentence. 347
Coſts for Plaintiff in Prohibition. 348
Prohibition in a Suit for Agiſtment of dry Cattle; Conſultation granted. 350
In Prohibitions both Parties are Actors and may traverſe upon Traverſe. *ibid.*

Quare Impedit. See Writ.

Queen Gold. See Aurum Reginae.

Recognizance.

THE Effect of a Recognizance to appear, given upon a Miſdemeanor. 358
A *Nolle Pros'* on one Information does not diſcharge the Recognizance; the Effect of it. *ibid.*
Non-appearance is no Breach of Behaviour. *ibid.*
Privilege of Peerage not allowed on Breach of Peace, but a Peer muſt enter into Recognizance. 359

Record.

Not neceſſary to be vouched in Pleading, where it is only Inducement, and not the Principal Point of the Caſe. 130

Releaſe.

Releaſe after Action brought, when to be pleaded. 338

Remainder. See alſo Eſtate-Tail.

Whether a Remainder, which is limited by Will to the Heirs Male of a Body of a Perſon who is living when the Remainder ſhould take Effect, be a good Remainder. *Page* 20
Such Remainder held good. 31
Diſtinction as to Croſs Remainders by Implication. 67
Remainder to the *Iſſue* would be a Word of Purchaſe even in a Deed. 136

Rent.

An Executor of a Landlord, where Rent due, ſhall have the ſame Benefit of the Act againſt an Execution, as the Teſtator might have had if living. 359
So an Adminiſtrator, but muſt come before Execution executed. 360
In Debt for Rent, Entry and Seiſin by a third Perſon, no good Plea. *ibid.*
Muſt ſhew an Elder Title. *ibid.*

Replevin. See alſo Traverſe.

Replevin Bonds good and allowable in Law, and uſual and common. 209
The Effect of a Replevin Bond. 210
Plea *Performavit omnia*, ill. *ibid.*
Replevin Bonds good, their Effect. *ibid.*
Replevin Bonds are now aſſignable by 11 *Geo.* 2. *cap.* 19. 211
The Manner of aſſigning them. *ibid.*
In Replevin, Conuſance. 233
The Sheriff's Duty in taking Pledges in Replevin. 331
How he is to plead. *ibid.*
The Effect of Replevin Bonds. 361
Plea in Replevin. 362

Reſcue.

Return of Reſcue. 362
Several Exceptions thereto. *ibid.*

Roll.

Looſe Roll loſt, how ſupplied. *Page* 355

Scandal.

CASE for Words ſpoken of a Juſtice of Peace in Relation to his Office. 206
Jacobite, Actionable. 207
Saying of a Juſtice of the Peace that he is diſaffected, not laid ſpoken of him *as ſuch*, not actionable. *ibid.*
Conſtruction *in mitiori ſenſu* exploded. *ibid.*
Words how to be taken. *ibid.*

Scire Facias.

It was agreed that a *Scire facias* was not a Writ *Original* but *Judicial*. 213
Scire facias in Replevin, how to be brought. 330

Seamens Wages. See alſo Maſter of a Ship.

Suits for Seamens Wages in the Admiralty and at Common Law, how prohibited to be obtained. 231
To be ſued for within ſix Years. *ibid.*

Serjeants.

Serjeants Writs, when returnable. 383

Seſſions, General and Quarter.

At what Seſſions Appeal to be brought. 251
The next Seſſions, is the *next after* Grievance. 253
Surveyors of Highways to account at Special Seſſions, and not at General Seſſions. 254
Whether an adjourned Seſſions be the *next* Seſſions on the Statute for Settlements of the Poor. 279

Settlement of the Poor. See Tit. Poor.

Sheriff. See alſo Tit. Replevin.

What done on the Death of one of the Sheriffs of *London.* *Page* 388
The Sheriff's Duty in taking Pledges in Replevin. 331
How he is to plead. *ibid.*

Ship. See Tit. Information.

The Maſter, tho' not on Board, or the Perſon having the Care of the Ship in his Abſence, ſubject to the Penalty on the Statute of the 10th of Queen *Anne*, for Mooring a Merchant Ship at the King's Moorings, at the Election of the King. 34
The Maſter engages againſt every Thing, except Pirates and Storms, and is anſwerable, tho' no apparent Neglect in him or his Servants and Seamen. *ibid.*
Action will lie either againſt the Maſter or Owners, for Goods loſt out of a Ship. 35

Ship-Money.

Caſe of Ship-Money. 390
Ship-Money illegal. 391

Slander. See Scandal.

Sodomy.

Indictment for Sodomy *in Ano* of a Girl; Majority of all the Judges held it was Sodomy both at the Common and Civil Law. 91
The Earl of *Macclesfield* conſulted, with his Opinion thereon. 92
The Etymology of the Name of this Crime. 94
The above Crime with a Girl, within the Statute 25 *H.* 8. *cap.* 6. *ibid.*
How puniſhed by the *Saxons.* 95
Etymology of the Words *Mankind* and *Womankind.* *ibid.*
Doctor *Strahan*'s Opinion on the Crime above, with Authorities from the Civil Law. *Page* 96

Statute.

A Statute, how to be laid in the Declaration. 372
The Stat. of 2 *Geo.* 2. for Relief of Inſolvent Debtors, how pleaded. *ibid.*
Penal Statutes are to be expounded favourably. 32
Anſwer to the Objection, That a Penal Statute ſhould be favourably expounded, it being a remedial Law, and beneficial to the Publick. 34

Tenant-Right Eſtate. See Cuſtom.

Tender. See Plea.

Timber. See Copyhold.

Summons.

Held by the Chancellor and Judges, that it is requiſite by the Law of Nature that every Perſon, before he can be puniſhed, ought to be preſent, and if abſent by Contumacy, he ought to be ſummoned and make Default. 206
The Recorder of *Colcheſter* reſtored becauſe not ſummoned. *ibid.*
Summonitus inſtead of *Attachiatus*, in Caſe of a Member of Parliament. 341

Sunday.

A Writ of Inquiry executed on a *Sunday* held naught, and Advantage may be taken of it on a Writ of Error, tho' not aſſigned for Error. 373
A Perſon may be taken on an Eſcape Warrant on a *Sunday.* 374
Declaration in Treſpaſs delivered on a *Sunday*, held good. 375

Superſedeas.

Superſedeas granted to *Habeas Corpus*, &c. to Mayor's Court in County Palatine of *Cheſter.* 270

Surpluſage.

Surpluſage rejected, and makes no Variance. *Page* 354

Tender and Refuſal. See Tit. Pleas.

IF a Tender be to *J. S.* in full of all Demands, it will be ſo tho' he take it in Part. 150

Tender and Refuſal, how to be pleaded. *ibid.*

Trade.

Bond in Reſtraint of Trade may be good on a particular Conſideration, which is reaſonable. 296

As where the Defendant has been taken in as a Servant without Money, where a conſiderable Sum might be reaſonably expected. 298

Traverſe.

There ought to be ſome ſpecial Inducement to traverſe. 234

If you take a material Traverſe, it is well enough. *ibid.*

There is in Treſpaſs a Traverſe of a Licence, and as to this Treſpaſs and Replevin it is the ſame. *ibid.*

In Replevin you cannot traverſe your being a Bailiff, nor can you traverſe *De injur' ſua propr' ſans tali cauſa, Abſque hoc*, that he was a Bailiff, for that is traverſing the whole Avowry. *ibid.*

Traverſe upon Traverſe, and in Prohibition both Parties are Actors. 349

Treſpaſs. See alſo Tit. Pleas.

Caſe lies for a ſpecial Kind of Treſpaſs in making a Tavern be reputed a diſorderly Houſe. 211

Treſpaſs will not lie, but *Caſe*, where a Nuſance is occaſioned by an Act in other Reſpects lawful. 212

Whether in Plea in Treſpaſs for taking Cattle *Damage-feaſant*, the Defendant need ſet out the Title. *Page* 255

Treſpaſs for taking away *diverſa bona & catalla*, Judgment arreſted for the Uncertainty. 377

In Treſpaſs, Plaintiff need not make Title. 378

Treſpaſs, Double Traverſe, ill. 379

Juſtification in Treſpaſs and falſe Impriſonment by *Cap' Utleg'*. *ibid.*

Treſpaſs, Juſtification by Officer. 380

Damage-feaſant pleaded in Treſpaſs. 381

Trial.

What Power an inferior Court has to grant a new Trial. 198

Variance.

VAriances between a Condition and a Conviction, helped by Averments which were not traverſed. 356

Venue.

Where a *Venue* ought to be out of two Places, or not. 130

Verdict.

If a Verdict be inſenſible there muſt be a *Venire Facias de novo.* 229

Veſtry.

Whether a Parſon can adjourn the Veſtry by his own Authority. 168

That the Right of Adjournment is in the Aſſembly. 170

Power of preſiding does not infer a Power of adjourning. 171

The major Part have a Right of determining for themſelves. 172

Viſitor.

The Power of Viſitors. 298

Corporate Acts examinable by the Viſitor. *Page* 299
Power to Succeſſors, how given in Acts of Parliament. *ibid.*
When the Crown has appointed a General Viſitor, it cannot afterwards enlarge his Power. 300
Royal Foundations not Viſitable by Biſhop. 329

Uncertainty.

Treſpaſs for taking away *Diverſa bona & catalla*, Judgment arreſted for the Uncertainty. 377

University.

When and how Cognizance by the Univerſity of *Cambridge* is to be claimed. 155, *&c.*
How the Univerſity is to claim Cognizance. 280

Uſes and Truſts.

When a defective Common Law Conveyance ſhall operate as a Covenant to ſtand ſeiſed to Uſes. 63
The Words *Uſe* and *Truſt* Synomymous Terms, and no Difference between a Deed and a Will. *ibid.*

Warrants. See alſo Tit. Conſtable.

WArrants, when and where to be returned. 132
No Time for Examination ever fixed in a Warrant. 143, 144

Will. See Heirs and Tit. Expoſition of Words and Eſtate-Tail.

A Deviſe *Eccleſiæ Sanct. Andreæ Holborn*, good to the Rector and his Succeſſors. 24
A Deviſe to a Man and his Iſſue, if the Deviſee had Iſſue, it is a Joint-Eſtate to them all, but if none, the Deviſee ſhall take an Eſtate-Tail. 25, 26
A Deviſe to the Heir Male a good Name of Purchaſe, and the Brother's Son ſhall take the Land, tho' the Deviſor had three Daughters. *Page* 26
A Deviſe to the Heirs Male of the Body of *Robert Durdant* then living, a good Deviſe. *ibid.*
The Words *now begotten* in a Deviſe, *tantamount* to the Words *now living*. 26, 27
A Deviſe to the Iſſue and their Iſſue, and there be more than one, it muſt go to the Eldeſt in a Courſe of Deſcent. 28
A Deviſe to the Houſe or Family of ſuch a one, a good Deviſe to the chief and eldeſt Perſon of the Family. 29
Deviſe to one for Life, Remainder to the Heirs Male of his Body, is an Eſtate-Tail in the Deviſee. *ibid.*
Deviſe to his Son *Bernard* for Life, and after his Deceaſe to the Iſſue of his Body, and for want of ſuch Iſſue, then over, makes an Eſtate-Tail by Implication. 30
Wherever the Words of Limitation are annexed to the Iſſue of the Deviſee, the Deviſee takes only an Eſtate for Life. 64
Deviſe of Land to a Man and his Children or Iſſue, is an Eſtate-Tail if he hath no Iſſue. *ibid.*
Deviſe of Land to a Man and the Iſſue of his ſecond Wife (having then a firſt Wife) is an Intail. *ibid.*
But a Deviſe to *R.* and to the next Heir Male of *R.* and to the Heirs Male of the Body of ſuch next Heir Male, is but an Eſtate for Life in *R.* 64, 65
Deviſe to *A.* for Life, and after his Death to his Iſſue Male and to the Heirs Male of the Body of ſuch Iſſue, is but an Eſtate for Life. 65
Deviſe to one and his Iſſue, he then having none, is an Eſtate-Tail. *ibid.*
Deviſe to one and his Children, he takes an Eſtate-Tail, if he has no Children. *ibid.*
No Words in a Will to be rejected if they may have a reaſonable Conſtruction. 25

The TABLE of the *Principal Matters.*

Improper Words in a Will, will ſometimes in Law be ſuppoſed to be meant properly to ſupport the Will, as *Hæredibus procreatis*, if there be no Iſſue, will be ſuppoſed to be meant *procreandis.* *Page* 27

Deviſe for Life to *B.* Remainder to the next Heir Male in the ſingular Number, and for Default of ſuch Heir Male, to remain over, is an Eſtate-Tail. 84

Deviſe that after his Mother's Death his Son *William* ſhall have the Land, and if he have a Male Iſſue, his Son to have it after his Death, and if not, to his next Son, is an Eſtate-Tail. *ibid.*

Deviſe to *E.M.* and *R.S.* during their natural Lives, equally to be divided between them, and after their Deceaſe to the next Heir Male of their Bodies; but if either die, without ſuch Iſſue, then to the other, and after his Deceaſe to the Heirs Male of his Body, and for want of ſuch Iſſue of both, then over, with a Proviſo that the cutting down Timber by any of the Deviſees ſhall be a Forfeiture; held to be an Eſtate-Tail in *E.M.* and *R.S.* 84, 85

A Deviſe to his Son for his natural Life, and after his Deceaſe to his Iſſue of the Body of his ſecond Wife, is an Eſtate-Tail. 85

Deviſe to *Evers Armin* for Life, and in Caſe he ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs; this held to be a good Deviſe to the firſt Son and Heir Male in Tail, and that he took by Purchaſe. 28

A Man Deviſes his Goods to his Wife, and after her Death that his Son and Heir ſhould have his Houſe; Son and Heir cannot have the Houſe during the Wife's Life, for tho' not expreſly deviſed to the Wife, ſhe muſt have it, elſe no Body can, for the Teſtator has broke the Deſcent to the Heir. 28, 29

Conſtruction of a Will of Lands, whether it gave an Eſtate for Life only, or an Eſtate-Tail. 58

Judgment in the Great Seſſions in favour of the Eſtate-Tail. 62

The Word *Heirs* not neceſſary in a Will to create a Fee. *Page* 63

A Deviſe of Land to *A. paying ſeveral annual Sums*, was a Fee-ſimple. *ibid.*

And ſo is a Deviſe of all my *Eſtates and Hereditaments.* *ibid.*

Tho' in a Deviſe to Truſtees the Word *Heirs* is omitted, yet ſince the *Truſts* which are to ariſe out of their Eſtate are to continue for ever, the Truſtees take a Fee. 69, 71

Deviſe to one for Life, and after his Deceaſe to his Children, and that if he died without Iſſue, Remainder to *J.S.* ſuch Deviſee did not take an Eſtate-Tail. 69

The legal Conſtruction ſhall be taken unleſs the Intention of the Teſtator appears otherwiſe. *ibid.*

Difference between a Deed and a Will. 74

No Words in a Will to be conſtrued Nugatory. 134

The Intention of the Party not to break thro' the Rules of Law. *ibid.*

The Intention of the Party ſhall controul the Operation of Law where it may. 135

The Conſtruction of the Word *Iſſue* in a Will. 138

A Codicil is Part of the Will. 192

The Will and Codicil make but one Will 193

A Codicil a good Republication of a Will, tho' not ſaid to be annexed. *ibid.*

An Attempt to conſtrue a Will of Lands containing Clauſes which ſeem to be repugnant. 224

A Clauſe in a Will not to be rejected, if capable of any Meaning. 228

Will. Executory Deviſe.

At what Time Executory Deviſes began to be allowed. 184

Deviſe to *A.* and his Heirs for ever, on Condition to pay Teſtator's Debts, and if he do not pay them, then to *B.* and her Heirs for ever; *A.* dies before the Deviſor, *B.* ſhall not take by way of Executory Deviſe. 185

As to the Words, *If my Son and Daughter die before* 21, *and leave no Heirs of their Bodies, all my Freehold Lands not hereby diſpoſed nor ſettled, ſhall go to my Wife in Fee*, making an Executory Deviſe. *Page* 225, 228

Witneſs.

One Witneſs enough in High Treaſon for waſhing Guineas. 397
What makes a Witneſs infamous, and what not. 208
A Perſon intereſted in the ſame Queſtion, not a good Witneſs unleſs there is a Neceſſity in the Nature of the Thing. 246
Caſes where a Perſon intereſted may be a Witneſs. *ibid.*
The Maſter of a Ship not a good Witneſs to prove the Loſs of her, he having inſured ſome Goods in the Ship. 249

Words actionable or not. See Tit. Scandal.

Writ.

Writ of Covenant.

Rules for Amendments of Writs of Covenant, *&c.* 186
A great Variety of Caſes of Amendment. *Page* 186
The general Rule is where the Inſtructions were right. *ibid.*
A Caption of a Warrant of Attorney in a Recovery, helped by the Statute. 187
If Inſtructions be given to the Curſitor to make out a Writ, and *A.* ſuppoſe therein named, be called *Miles*, but the Curſitor names him *Gent.* this may be amended. *ibid.*
Chancery not the proper Court to amend this Writ. *ibid.*
Where the Return of the Writ of Covenant was before the *Teſte*, the Court held it ſhould be amended. 188
In *Quare Impedit*, both are Actors. 352

Writ of ad quod Damnum. See Highways.

Writ of Inquiry.

Writ of Inquiry executed the 15th of *June*, which was on a *Sunday*, held naught. 373

Writ of Error. See Error.

F I N I S.